

No. 98-470-CFX

Title: Ruhrgas AG, Petitioner
v.
Marathon Oil Company, et al.

Docketed:
September 18, 1998

Court: United States Court of Appeals for
the Fifth Circuit

Entry Date

Proceedings and Orders

Sep 18 1998 Petition for writ of certiorari filed. (Response due
November 9, 1998)
Oct 5 1998 Order extending time to file response to petition until
November 9, 1998.
Nov 6 1998 Brief of respondents Marathon Oil Company, et al. in
opposition filed.
Nov 18 1998 DISTRIBUTED. December 4, 1998
Nov 19 1998 Reply brief of petitioner Ruhrgas Ag filed.
Dec 7 1998 Petition GRANTED.
SET FOR ARGUMENT March 22, 1999.

Dec 23 1998 Record filed.
Jan 21 1999 Brief of petitioner Ruhrgas AG filed.
Jan 21 1999 Joint appendix filed.
Jan 21 1999 Joint appendix in two volumes.
Feb 11 1999 CIRCULATED.
Feb 23 1999 Brief amicus curiae of Conference of Chief Justices filed.
Feb 24 1999 Brief of respondent Marathon Oil Company, et al. filed.
Mar 12 1999 Reply brief of petitioner Ruhrgas AG filed.
Mar 18 1999 LODGING consisting of forty copies of an Eleventh
Circuit decision submitted by counsel for the respondent
and distributed.
Mar 22 1999 ARGUED.

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No. _____

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1997

RUHRGAS AG,

Petitioner,

v.

MARATHON OIL COMPANY, MARATHON
INTERNATIONAL OIL COMPANY, and
MARATHON PETROLEUM NORGE A/S,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a federal district court is absolutely barred in all circumstances from dismissing a removed case for lack of personal jurisdiction without first deciding its subject-matter jurisdiction?

PARTIES

Petitioner is Ruhrgas AG. Petitioner was the defendant in the underlying action originally filed in Texas state court and removed to the United States District Court for the Southern District of Texas, Houston Division, and was the Appellee and Cross-Appellant in the Fifth Circuit Court of Appeals.

Respondents are Marathon Oil Company, Marathon International Oil Company, and Marathon Petroleum Norge A/S. Respondents were plaintiffs in the underlying litigation and were the Appellants and Cross-Appellees in the Fifth Circuit. Respondents are referred to herein as "the Marathon Plaintiffs."

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Petitioner Ruhrgas AG states that no single company owns more than fifty percent of the voting shares of Ruhrgas AG, but under a temporary contractual relationship, Bergemann GmbH may exercise 59.8 percent of the voting rights. Furthermore, Ruhrgas AG has no direct non-wholly owned subsidiaries in the United States.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ruhrgas AG ("Ruhrgas") respectfully prays that a writ of certiorari issue to review the decision of the en banc United States Court of Appeals for the Fifth Circuit dated June 22, 1998. By a vote of 9 to 7, a majority of the en banc court vacated the district court's judgment dismissing the case for lack of personal jurisdiction and remanded it to the district court for a determination of subject-matter jurisdiction. *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211 (5th Cir. 1998), App. A. The majority did not reach the substance of the personal-jurisdiction issue. It announced that in a removed case, a federal district court never has discretion to dismiss for lack of personal jurisdiction before deciding whether it has subject-matter jurisdiction. 145 F.3d at 217-225, App. A at 9-30.

OPINIONS AND ORDERS DELIVERED BELOW

The opinion of the majority of the court below, as well as the dissenting opinion, are reported at 145 F.3d 211 (5th Cir. 1998), and are reprinted as Appendix A hereto.

The memorandum and order of the United States District Court for the Southern District of Texas granting Ruhrgas' Motion to Dismiss for lack of personal jurisdiction, denying Ruhrgas' Motion for Reconsideration of Order Denying Motion for Stay Pending Arbitration, and denying the Plaintiffs' Motion to Remand and Ruhrgas' Motion to Dismiss on *forum non conveniens* grounds as

moot (March 29, 1996) is not reported and is reprinted as Appendix B hereto.

The order of the United States District Court for the Southern District of Texas dismissing the action for lack of personal jurisdiction (March 29, 1996) is not reported and is reprinted as Appendix C hereto.

JURISDICTION OF THIS COURT

This petition for a writ of certiorari seeks review of the June 22, 1998 decision of the en banc United States Court of Appeals for the Fifth Circuit. Jurisdiction of this Court to review the decision of that court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. art. III:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same

State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. amend. V:

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. XIV:

Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

This case arises out of an international commercial agreement involving the sale of natural gas produced from the Norwegian North Sea. The agreement, which is known as the Heimdal Gas Sales Agreement ("HGSA"), was negotiated in Europe and was executed in Norway in 1984. As the seller under the HGSA, Marathon Petroleum Company (Norway) ("MPCN") has sold 70 percent of its share of the Heimdal Field gas production to a group of European companies, including Petitioner Ruhrgas. Inasmuch as MPCN had and has no employees, the negotiation and execution of the HGSA and the performance thereunder was and is conducted by personnel of Plaintiffs Marathon Oil Company ("MOC") and Marathon International Oil Company ("MIOC"), MPCN's great-grandparent and grandparent corporations, acting on behalf of MPCN. The buyers purchase the gas from

MPCN for resale into the European market. The HGSA contains a Norwegian choice-of-law clause and a broad arbitration clause providing for arbitration in Stockholm, Sweden under the arbitration rules of the International Chamber of Commerce.

On July 6, 1995, MOC, MIOC, and Marathon Petroleum Norge A/S ("Norge"), MPCN's sister corporation, filed this action against Ruhrgas in a Texas state court. In their lawsuit, the Marathon Plaintiffs allege *inter alia* that Ruhrgas made misrepresentations in Europe concerning the price to be paid to MPCN for the gas. Ruhrgas vehemently denies these allegations.

Ruhrgas timely filed its notice of removal to the United States District Court for the Southern District of Texas. The removal was based on three independent grounds: (1) the dispute relates to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, and removal jurisdiction therefore exists under 9 U.S.C. § 205; (2) Norge (the only foreign plaintiff) was joined fraudulently and is not a real party in interest, and diversity jurisdiction therefore exists; and (3) the case raises questions of foreign and international relations that are incorporated into and form part of the federal common law.

Ruhrgas then filed a Motion to Dismiss for lack of personal jurisdiction, and subject thereto, a Motion for Stay Pending Arbitration and a Motion to Dismiss on *forum non conveniens* grounds. The Marathon Plaintiffs

filed a Motion to Remand based on an alleged lack of subject-matter jurisdiction.

On March 29, 1996, after the parties had completed jurisdictional discovery and briefing, the district court granted Ruhrgas' Motion to Dismiss for lack of personal jurisdiction, without reaching the subject-matter jurisdiction issues raised by the Marathon Plaintiffs' Motion to Remand, and denied Ruhrgas' Motion for Reconsideration of its prior Order denying Ruhrgas' Motion for Stay Pending Arbitration.

On appeal, a three-judge panel of the Fifth Circuit, without reaching the issue of personal jurisdiction, found subject-matter jurisdiction lacking and vacated the judgment of the district court with instructions to that court to remand the case to state court. After this Court denied Ruhrgas' Petition for Writ of Certiorari, which was limited to the question whether subject-matter jurisdiction existed under 9 U.S.C. § 205, the en banc court, on its own motion, granted rehearing en banc, thereby vacating the panel decision. The case was argued orally to that court on May 18, 1998, and on June 22, 1998, the en banc court, in a 9-to-7 decision, vacated the district court's judgment dismissing the case for lack of personal jurisdiction, and remanded the case to the district court with instructions to take up the issue of subject-matter jurisdiction in the first instance.¹

¹ The majority opinion states that the three-judge panel's opinion "has been vacated and thus is no longer binding precedent, . . . and we express no opinion on that issue [the question of subject-matter jurisdiction]." 145 F.3d at 225 n.23, App. A at 30 n.23.

REASONS FOR GRANTING THE WRIT

The courts of appeals have held uniformly that a federal court always has jurisdiction to determine its own jurisdiction. *See, e.g., Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 603 (1st Cir. 1988); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1078 (7th Cir. 1987). Consistent with that rule, the courts of appeals, until the majority decision in this case, had held that district courts have the discretion to dismiss a removed case, in appropriate circumstances, for want of personal jurisdiction, before reaching the issue of subject-matter jurisdiction. *See, e.g., Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155 (2d Cir. 1996); *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559, 556-57 (5th Cir. 1993), *cert. denied*, 510 U.S. 1041, 114 S. Ct. 685 (1994); *Wilson v. Belin*, 20 F.3d 644, 651 n.8 (5th Cir.), *cert. denied*, 513 U.S. 930, 115 S. Ct. 322 (1994); *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1494 (5th Cir. 1993), *cert. denied*, 510 U.S. 1044, 114 S. Ct. 690 (1994); *Walker v. Savell*, 335 F.2d 536, 538 (5th Cir. 1964); *see also Allen v. Ferguson*, 791 F.2d 611, 615 (7th Cir. 1986).² As Judge Higginbotham noted in his dissent in this case: "The practice has been so commonplace that only two other circuits have even had the occasion to address the

² Although the *Allen* court did not expressly decide the issue, the *Allen* court at least assumed that in certain circumstances, a district court could dismiss for want of personal jurisdiction, rather than remand for a defect in subject-matter jurisdiction; otherwise, it never would have conducted an analysis of the complexity of the alleged jurisdictional defects before it. *See Allen*, 791 F.2d at 615-16; *see also Marathon Oil Co. v. Ruhrgas*, 145 F.3d at 227 n.2 (Higginbotham, J., dissenting), App. A at 35 n.2.

issue, despite its regular appearance on the dockets of federal trial courts across the country." 145 F.3d at 227 (Higginbotham, J., dissenting), App. A at 34-35 (citing *Cantor Fitzgerald*, 88 F.3d at 155 and *Allen*, 791 F.2d at 615). The majority of the en banc court nevertheless ruled that the Second Circuit's decision in *Cantor Fitzgerald* and the prior Fifth Circuit decisions upholding this "common-place" practice were wrongly decided.

The mandatory rule now adopted by the Fifth Circuit, which requires that district courts consider the subject-matter element of their jurisdiction before considering personal jurisdiction in every removed case, is not consistent with this Court's prior decisions dealing with the jurisdiction of federal courts. It is in direct conflict with the Second Circuit's decision in *Cantor Fitzgerald* and it creates a rigid sequencing of jurisdictional decisions in removed cases that unnecessarily ties the hands of federal district judges in the management of their crowded dockets.

If certiorari is not granted, the conflicting decisions of the Fifth and Second Circuits on this important procedural question will create uncertainty in district courts across the nation concerning the proper manner of proceeding in removed cases. Furthermore, those courts following the Fifth Circuit rule will be forced to decide difficult subject-matter jurisdiction issues presented in removed cases, even when the case may be disposed of easily on personal-jurisdiction grounds. As pointed out in Judge Higginbotham's dissent, there is no constitutional, statutory, or jurisprudential requirement for a mandatory

rule, and it constitutes "unauthorized appellate rulemaking." 145 F.3d at 225, 233 (Higginbotham, J., dissenting), App. A at 31, 51.

I. The Fifth Circuit's Decision Conflicts with Prior Decisions of this Court

The majority decision of the Fifth Circuit is premised on its conclusion that in a removed case, subject-matter jurisdiction is elevated above personal jurisdiction in a hierarchy of jurisdictional importance and therefore must be determined first in every removed case. That conclusion cannot be reconciled with prior decisions of this Court.

In *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 701 (1982), this Court stated that "the validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter *and* the parties." (emphasis added) In 1937, this Court noted that personal jurisdiction is as integral to the power of a federal court as is subject-matter jurisdiction. In *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 382 (1937), this Court held that personal jurisdiction "is an essential element of the jurisdiction of a district . . . court as a federal court, and that in the absence of this element *the court is powerless to proceed to an adjudication.*" (emphasis added)

As noted by Judge Higginbotham in his dissent, the majority's effort to elevate subject-matter jurisdiction above personal jurisdiction in importance and therefore in sequencing "rests on a flawed vision of the relationship between Article III and the power of the inferior courts." 145 F.3d at 229 (Higginbotham, J., dissenting),

App. A at 39. Both personal jurisdiction and subject-matter jurisdiction "are rooted in core constitutional precepts": subject-matter jurisdiction in Article III; personal jurisdiction in the Due Process Clause. *Id.* As pointed out by Judge Higginbotham, one of the alleged defects in subject-matter jurisdiction in this case – a lack of complete diversity – "is not itself a requirement of Article III, but rather suffers from want of a jurisdictional grant by Congress. In the literal sense then, personal jurisdiction rests more immediately upon a constitutional command than does a want of complete diversity." 145 F.3d at 229 (Higginbotham, J., dissenting), App. A at 40. In any event, both components of the federal courts' jurisdiction over a particular case – subject-matter and personal – are derived from the Constitution, and both are essential elements of a court's power to proceed to an adjudication.

Nothing in the Constitution or this Court's prior decisions supports the majority's conclusion that the due-process limitations on a federal court's power somehow are subordinate to the Article III limitations on a federal court's power. *Steel Co. v. Citizens for a Better Environment*, ___ U.S. ___, 118 S. Ct. 1003 (1998), relied on heavily by the majority, provides no such support. In *Steel Co.*, this Court did not differentiate between subject-matter jurisdiction and personal jurisdiction, but stressed that "the requirement that *jurisdiction* be established as a threshold matter . . . is 'inflexible and without exception,' " and that " 'without *jurisdiction* the court cannot proceed at all in any cause.' " *Id.* at 1012 (quoting *Mansfield, C. & L.N.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S. Ct. 510, 511 (1884) and *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514, 19 L. Ed. 264 (1868)). (emphasis added) This Court repudiated the

prior practice of some courts of appeals of " 'assuming' [subject-matter jurisdiction] for the purpose of deciding the merits." *Id.* (emphasis added)

As Judge Higginbotham noted in his dissent, there is a "plain lack of relevance" of these principles to the issue presented in this case. 145 F.3d at 228 (Higginbotham, J., dissenting), App. A at 37. Issues that go to the merits of a claim are quite different from issues of jurisdiction. Jurisdiction speaks to the power of the court to adjudicate the claim. As held by this Court in *Employers Reinsurance*, a court may lack that power either because it does not have jurisdiction of the subject matter or because it does not have jurisdiction over the person of the defendant. 299 U.S. at 381-82. This Court's decision in *Steel Co.* stands for the sound proposition that before reaching the merits of a case the court must have "jurisdiction." But "jurisdiction" encompasses both subject-matter jurisdiction and personal jurisdiction. *Steel Co.* simply does not speak to the question of which of two jurisdictional issues must be resolved first. Until the majority decision in this case, the courts of appeals had held that the order in which to take up jurisdictional questions is a matter of trial practice and convenience, reviewed on appeal on an abuse-of-discretion standard.

The majority's decision in this case likewise cannot be reconciled with this Court's decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996). In that case, the district court lacked complete diversity upon removal, and the district court erroneously overruled the plaintiff's objection to subject-matter jurisdiction. However, the lack of complete diversity later was cured by the district court's dismissal of a nondiverse defendant following a settlement. The

rule applied by the majority of the Fifth Circuit in this case would suggest that every act taken by the district court in *Caterpillar* was void, including the dismissal of the nondiverse party prior to entry of final judgment. That, however, was not the decision of this Court. Instead, this Court rejected the jurisdictional challenge in *Caterpillar*. As Judge Higginbotham noted in his dissent in this case, "[i]f the Supreme Court tolerates a capture of jurisdiction through the dismissal of a settling party by a court that lacked subject-matter jurisdiction, surely it permits a district court to dismiss a case for want of personal jurisdiction, before considering a challenge to subject-matter jurisdiction." 145 F.3d at 229 (Higginbotham, J., dissenting), App. A at 41.

In short, the mandatory rule adopted by the Fifth Circuit, which prohibits federal district courts from ever dismissing a removed case for lack of personal jurisdiction before reaching a question of subject-matter jurisdiction, is not consistent with prior jurisprudence from this Court.

II. The Fifth Circuit's Decision in this Case Conflicts with the Second Circuit's Decision in *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152 (2d Cir. 1996)

In *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d at 155, the Second Circuit held that the district court in that removed case "properly exercised its discretion in first deciding the motion to dismiss for lack of personal jurisdiction over the defendants before considering the question of federal subject-matter jurisdiction." In this case, the majority of the Fifth Circuit held that no such discretion

ever can exist in a removed case. There is a direct conflict between *Cantor Fitzgerald* and the majority decision in this case.

The majority opinion dealt with this conflict in two ways. First, the majority concluded that *Cantor Fitzgerald* itself is inconsistent with an earlier Second Circuit decision, *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674 (2d Cir. 1990). See 145 F.3d at 222, App. A at 23. However, as noted by Judge Higginbotham in his dissent, the court in *Cantor Fitzgerald* distinguished *Rhulen*, citing it for the proposition that a district court may not first decide a challenge to personal jurisdiction *unless* the personal-jurisdiction question is easier to resolve than the subject-matter jurisdiction question. See 145 F.3d at 227 n.2 (Higginbotham, J., dissenting), App. A at 35 n.2; see also *Cantor Fitzgerald*, 88 F.3d at 155. *Cantor Fitzgerald* represents the law of the Second Circuit, and the mandatory rule adopted by the Fifth Circuit's decision in this case directly conflicts with the Second Circuit rule.

Second, the majority decision in this case concluded that *Cantor Fitzgerald* was grounded on the doctrine of "hypothetical jurisdiction" discredited by this Court in *Steel Co.*, based on the fact that one of the cases cited by the court in *Cantor Fitzgerald*, *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151 (2d Cir. 1990), advocated the "hypothetical-jurisdiction" doctrine. *Cantor Fitzgerald*, however, did not premise its holding on the notion of hypothetical jurisdiction. To the contrary, the "hypothetical-jurisdiction" doctrine – which assumes jurisdiction for the purpose of deciding the *merits* – by definition, does not apply in the context of deciding which of two jurisdictional issues, subject-matter or personal, should be

resolved first. Whatever choice is made, the court is not assuming jurisdiction for the purpose of deciding the merits. The decision of the Fifth Circuit in this case directly conflicts with the Second Circuit's decision in *Cantor Fitzgerald*.

III. Federalism Concerns Support the Discretionary Rule Adopted by the Second Circuit in *Cantor Fitzgerald* and Proposed by the Dissent in this Case

Federalism concerns do not require that district courts always decide subject-matter jurisdiction before personal jurisdiction in a removed case. The prior circuit decisions addressing the question properly have considered federalism concerns on a case-by-case basis. For example, in *Asociacion Nacional*, 988 F.2d at 566-67, the court noted that personal jurisdiction could be addressed first because the personal-jurisdiction issue raised purely federal constitutional issues and "federal intrusion into state courts' authority" therefore was "minimized." In *Allen*, 791 F.2d at 615, after the court had acknowledged that personal jurisdiction involved state law issues that were not easier to resolve than the subject-matter jurisdiction issues, the court held that for this reason it was an abuse of discretion to resolve the personal-jurisdiction issue before resolving the subject-matter issue. In the present case, contrary to *Allen*, but as in *Asociacion Nacional*, the personal-jurisdiction issue is "a relatively simple question of federal law", whereas "the Plaintiffs' opposition to federal subject matter jurisdiction was a difficult one to address." 145 F.3d at 231, 233 (Higginbotham, J., dissenting), App. A at 46, 49. Under these circumstances,

it is appropriate for a district court to exercise its discretion to decide personal jurisdiction first.

The discretionary rule adopted by the Second Circuit in *Cantor Fitzgerald* and proposed by Judge Higginbotham in his dissent is consistent with constitutional requirements, gives due consideration to federalism concerns, preserves the flexibility needed by the federal district courts in the management of their dockets, and promotes judicial efficiency. Although district courts typically should first confirm their subject-matter jurisdiction, the district court should have the discretion to opt instead to first resolve a challenge to personal jurisdiction in appropriate circumstances. For example, when the attack on personal jurisdiction presents a question of federal law that is far more easily resolved than a challenge to subject-matter jurisdiction, when the defendant's removal is not frivolous and made in apparent good faith, and when the challenge to personal jurisdiction does not raise significant issues of state law or the attack on subject-matter jurisdiction does, the district court should be permitted to first resolve the personal-jurisdiction challenge. 145 F.3d at 232 (Higginbotham, J., dissenting), App. A at 47-48. Furthermore, when the subject-matter jurisdiction question turns in part on the presence of personal jurisdiction, the district court should be permitted to first resolve objections to personal jurisdiction. *Id.* Such a discretionary rule is preferable to the inflexible, mandatory rule adopted by the Fifth Circuit for which there is no constitutional, statutory, or jurisprudential requirement.

IV. This Case Presents an Important Federal Question

Until the majority's decision in this case, the federal district courts in this country have enjoyed the discretion to choose to avoid difficult questions of subject-matter jurisdiction when the case may be resolved easily through dismissal for lack of personal jurisdiction. As Judge Higginbotham noted in his dissent, "[t]he practice has been . . . commonplace . . .," 145 F.3d at 227 (Higginbotham, J., dissenting), App. A at 34-35, and is consistent with principles of judicial restraint, which teach that federal courts should not reach out to resolve complex and controversial questions when a decision may be based on a narrower ground. *Id.* at 231, App. A at 45; see *Allen*, 791 F.2d at 615. Given the crowded dockets faced by district judges, the rule adopted by the Fifth Circuit, mandating that the district courts address difficult issues of subject-matter jurisdiction, even when federal law clearly mandates that the case be dismissed for lack of personal jurisdiction, will have a real, practical, and negative effect on the federal district courts. As Justice Breyer noted in his concurring opinion in *Steel Co.*, "to insist upon a 'rigid order of operations' in today's world of federal court caseloads that have grown enormously over a generation means unnecessary delay and consequent added cost." *Steel Co.*, 118 S. Ct. at 1021 (Breyer, J., concurring). Although this Court held in *Steel Co.* that the Constitution mandates that the district courts decide jurisdictional issues before reaching *merits* issues, there is no constitutional, statutory, or jurisprudential requirement for a rigid order of decision when a district court is presented with two independent jurisdictional questions.

As Judge Higginbotham aptly noted in his dissent:

A level of discretion is enormously preferable to the majority's alternative, a mechanical and rigid ordering of decision making. We cannot see around corners, nor can we predict the infinite variety of cases that may one day come before our district courts. Rules that lack flexibility are often vices in and of themselves when dealing with trial courts. . . . The very nature of the work of a federal trial judge here makes discretion a value in itself.

145 F.3d at 232 (Higginbotham, J., dissenting), App. A at 48.

The Fifth Circuit's decision in this case will have a practical and negative impact on each federal district court in the management of removed cases. The question whether federal district courts are required to follow a rigid order of decision on jurisdictional issues in removed cases is an important issue of federal constitutional and procedural law that is deserving of review by this Court. Ruhrgas respectfully requests that this Court grant certiorari to resolve the conflict between the Second and Fifth Circuits and to provide guidance to the district courts on this important federal question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20361

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
and
MARATHON PETROLEUM NORGE A/S,
Plaintiffs-Appellants/
Cross-Appellees,
VERSUS
A.G. RUHRGAS,
Defendant-Appellee/
Cross-Appellant.

Appeals from the United States District Court
for the Southern District of Texas

June 22, 1998

Before POLITZ, Chief Judge, KING, JOLLY, HIGGIN-
BOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER,
BARKSDALE, EMILIO M. GARZA, DeMOSS,
BENAVIDES, STEWART, PARKER and DENNIS, Circuit
Judges.

JERRY E. SMITH, Circuit Judge:

Today we decide whether, on removal from a state
court, a district court has discretion to resolve a challenge

to personal jurisdiction before ruling on a legally more difficult question concerning its alleged lack of subject-matter jurisdiction. We conclude that, at least in removed cases, district courts should decide issues of subject-matter jurisdiction first and, only if subject-matter jurisdiction is found to exist, reach issues of personal jurisdiction. Accordingly, we vacate the judgment and remand with instruction to rule on the motion to remand to state court for lack of subject-matter jurisdiction.

I.

Marathon Oil Company, Marathon International Oil Company, and Marathon Petroleum Norge A/S (collectively "Marathon") sued Ruhrgas, a German gas supplier, under various tort theories in Texas state court. The alleged torts arose from Ruhrgas's relationship with Marathon Petroleum Company Norway ("MPCN"), a Marathon affiliate that is the equitable owner of a portion of the Heimdal natural gas field in the North Atlantic. Marathon Petroleum Norge A/S ("Norge"), as a Norwegian company, is required by law to hold legal title to MPCN's interest in the field.

MPCN entered into a sale agreement with Ruhrgas and other gas buyers whereby, for a premium price, the buyers would purchase MPCN's gas from the Heimdal field. This agreement provides that any disputes between MPCN and the buyers will be resolved through arbitration in Sweden.

At some point after the agreement was signed, the price of gas fell, and the buyers, including Ruhrgas, refused to pay MPCN the premium contract price. MPCN

instituted arbitration proceedings in Sweden, whereupon MPCN's affiliates¹ instituted these tort suits against Ruhrgas in Texas state court. They allege that Ruhrgas conspired to monopolize the gas market, tortiously interfered with MPCN's business opportunities, and committed other, similar torts, which had the effect of harming them, as lenders to MPCN.

Ruhrgas removed the case to federal court, asserting diversity jurisdiction under 28 U.S.C. § 1332(a), federal arbitration jurisdiction under 9 U.S.C. § 205, and federal question jurisdiction under 28 U.S.C. § 1331 based on the federal common law of international relations. Ruhrgas moved to dismiss for lack of personal jurisdiction and, in the alternative, requested a stay of proceedings pending arbitration. Marathon moved to remand to state court, asserting a lack of federal subject-matter jurisdiction, and opposed compelled arbitration.

The district court determined that, under the caselaw of this circuit, it had discretion to address personal jurisdiction before reaching the legally more difficult subject-matter jurisdiction issue. Finding personal jurisdiction lacking, the court dismissed the action and otherwise denied Ruhrgas's motion to compel arbitration. Marathon appealed, arguing that, on a motion to remand, the district court should have considered subject-matter jurisdiction before deciding personal jurisdiction.²

¹ Marathon Oil Company owns Marathon International Oil Company, which in turn owns Norge and MPCN. MPCN is not a party to this suit.

² Ruhrgas cross-appealed, contending that it should have been entitled to an order compelling the plaintiffs to arbitrate.

A panel of this court determined that the district court lacked subject-matter jurisdiction, and thus it vacated the dismissal for lack of personal jurisdiction and remanded with instruction to remand to state court. Although acknowledging that "in some instances we have permitted the dismissal of an action for lack of personal jurisdiction without considering the question of subject matter jurisdiction,"³ the panel concluded that "[t]he appropriate course [for a federal court] is to examine for subject matter jurisdiction constantly and, if it is found lacking, to remand to state court if appropriate, or otherwise dismiss."⁴

After the Supreme Court denied certiorari, we granted en banc review.⁵ We now take this opportunity, as an en banc court, to reconcile the conflicting circuit precedent cited by the panel and to explain a district court's obligation concerning which challenge it should decide first when confronted with a removed case in which the existence of subject-matter jurisdiction is questionable and personal jurisdiction is contested. We conclude that the court should proceed to consider the issue of subject-matter jurisdiction (even if that is the more legally difficult issue) before proceeding to address

³ *Marathon Oil Co. v. Ruhrgas, A.G.*, 115 F.3d 315, 318 (5th Cir.) (citing *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489 (5th Cir. 1993); *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559 (5th Cir. 1993); *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964)), *cert. denied*, 118 S.Ct. 413 (1997).

⁴ *Id.* (citing *Ziegler v. Champion Mortgage Co.*, 913 F.2d 228 (5th Cir. 1990)).

⁵ See *Marathon Oil Co. v. Ruhrgas A.G.*, 129 F.3d 746 (1997) (granting rehearing en banc).

whether it (or, for that matter, the state court) would have personal jurisdiction over the protesting defendant.

II.

"[F]ederal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress." *Aldinger v. Howard*, 427 U.S. 1, 15 (1976). The Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. "This language reflects a deliberate compromise[, known as the Madisonian Compromise,] reached at the Constitutional Convention between those who thought that the establishment of lower federal courts should be constitutionally mandatory and those who thought there should be no federal courts at all except for a Supreme Court with, *inter alia*, appellate jurisdiction to review state court judgments." RICHARD H. FALLON, ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 348 (4th ed.1996).

The effect of the compromise is this: "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other [federal] court . . . derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution." *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922). Accordingly, "we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the

federal courts," *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971), because the Constitution leaves Congress the policy choice concerning how far the federal courts' jurisdiction should extend.

Under our federal constitutional scheme, the state courts are assumed to be equally capable of deciding state and federal issues.⁶ To the extent that Congress elects to confer only limited jurisdiction on the federal courts, state courts become the sole vehicle for obtaining initial review of some federal and state claims. *Cf., e.g., Victory Carriers*, 404 U.S. at 212. Where Congress has given the lower federal courts jurisdiction over certain controversies, "[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined." *Id.* (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

The importance of both the lower federal courts' constitutional and statutory subject-matter jurisdiction should not be underestimated. "Because of their unusual nature, and because it would not simply be wrong but indeed would be an unconstitutional invasion of the powers reserved to the states if federal courts were to entertain cases not within their jurisdiction, the rule is well settled that the party seeking to invoke the jurisdiction of a federal court must

⁶ See *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); see also *Robb v. Connolly*, 111 U.S. 624, 637 (1884) (Harlan, J.) ("Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States. . . .").

demonstrate that the case is within the competence of that court." 13 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3522, at 61-62 (2d ed. 1984) (emphasis added).⁷

When a federal court acts outside its statutory subject-matter jurisdiction, it violates the fundamental constitutional precept of limited federal power. See *Oliver v. Trunkline Gas Co.*, 789 F.2d 341, 343 (5th Cir. 1986) (Higinbotham, J.). "Federal courts are courts of limited jurisdiction by origin and design, implementing a basic principle of our system of limited government. In sum, we do not visit a mere technicality upon the parties [by remanding to state court because their case falls outside the jurisdictional statutes]. Rather, we uphold a basic tenet of the American system of diffused political and judicial power." *Id.*

Since the panel issued its opinion, the Supreme Court has reminded us that our jurisdiction must be considered at the outset of a case. This Term, the Court rejected what the Ninth Circuit had labeled the "'doctrine of hypothetical jurisdiction'" – the process of "'assuming' [Article III] jurisdiction for the purpose of deciding the merits" of a case. *Steel Co. v. Citizens for a Better Env't*, 118 S.Ct. 1003, 1012 (1998) (majority opinion) (quoting *United States v. Troescher*, 99 F.3d 933, 934 n.1 (9th Cir. 1996)). The *Steel Co.* Court remarked:

⁷ See, e.g., *Mansfield, C. & L.M. Ry. v. Swan*, 111 U.S. 379, 382 (1884) (stating that "the rule [that a court not act outside its jurisdiction], springing from the nature and limits of the judicial power of the United States, is inflexible and without exception") (emphasis added).

This is essentially the position embraced by several Courts of Appeals, which find it proper to proceed immediately to the merits question, despite jurisdictional objections, at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied. . . .

We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 7 Wall. 506, 514, 19 L. Ed. 264 (1868). . . . The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S. Ct. 510, 28 L. Ed. 462 (1884).

. . .

"[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' . . . " *Arizonans for Official English v. Arizona*, . . . 117 S.Ct. 1055, 1071 . . . (1997). . . .

Id., at 1012-13.

The rule that we first address our jurisdiction is so fundamental that "we are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977) (citations omitted). "The general rule is that the parties cannot confer on a federal court jurisdiction that has not been vested in that court by the Constitution and Congress. This means that the parties cannot waive lack of [subject-matter] jurisdiction by express consent, or by conduct, or even by estoppel; the subject matter jurisdiction of the federal courts is too basic a concern to the judicial system to be left to the whims and tactical concerns of the litigants." 13 WRIGHT ET AL., *supra*, § 3522, at 66-68 (citations omitted); see, e.g., *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

III.

Ruhrgas does not dispute that a federal district court must determine its jurisdiction before proceeding to the merits of the case. It contests only the proposition that the federal court must reach the issue of *subject-matter* jurisdiction before reaching a challenge to *personal* jurisdiction. Ruhrgas argues that the district court may decide the personal jurisdiction challenge first, because "jurisdiction is jurisdiction is jurisdiction."

Because a federal district court must have both subject-matter jurisdiction over the removed controversy and personal jurisdiction over the defendant, so the argument goes, the court should have discretion to decide the easier

jurisdictional challenge first, to save judicial resources and to avoid tougher legal issues. We find Ruhrgas's advocacy of a discretionary rule in the removal context unpersuasive, as we explain.

A.

Although the personal jurisdiction requirement is a "fundamental principl[e] of jurisprudence," *Wilson v. Seligman*, 144 U.S. 41, 46 (1892), without which a court cannot adjudicate, the requirement of personal jurisdiction, unlike that of subject-matter jurisdiction, "may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue." *Insurance Corp. of Ireland*, 456 U.S. at 704; see also FED. R. CIV. P. 12(h). The defendant's ability to waive the defense arises from the reality that "[t]he requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. . . . It represents a restriction on the judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Insurance Corp. of Ireland*, 456 U.S. at 702; see also *Omni Capital Int'l v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987) (quoting the same).

The Supreme Court has carefully elucidated the distinctions between subject-matter and personal jurisdiction:

Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a

federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. "[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record." *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884).

None of this is true with respect to personal jurisdiction.

Insurance Corp. of Ireland, 456 U.S. at 702 (emphasis added) (citations omitted). The Court therefore has indicated that "jurisdiction" is not always "jurisdiction." The distinction is that subject-matter jurisdictional requirements prevent our overreaching into the powers that the Constitution and Congress have left to the state courts, while personal jurisdiction requirements prevent both state and federal courts from upsetting the defendant's settled expectations as to where it can reasonably anticipate being sued. See *id.* at 702-04.⁸

⁸ Following oral argument in the instant en banc proceeding, the Supreme Court once again has reminded us of the distinction between restrictions on subject-matter jurisdiction inherent in Article III and those that operate as an external limitation on an Article III court's adjudication. See *Calderon v. Ashmus*, 118 S. Ct. 1694, 1697 n.2 (1998).

The *Steel Co.* majority opinion plainly contemplates Article III jurisdiction in its use of the term "jurisdiction." See *Steel Co.*, 118 S. Ct. at 1013 ("Justice STEVENS' arguments . . . asserting that a court *may* decide the cause of action before resolving Article III jurisdiction – are readily refuted."). Although that case dealt with the easier issue of whether a federal court could pretermitt questions about its subject-matter jurisdiction in order to reach a case's "merits," the teachings of *Steel Co.* – combined with the reasons we discuss in more detail below – counsel against a discretionary rule in the case before us.

B.

A federal court's dismissal for lack of personal jurisdiction affects the state court from which a case was removed in a way that a remand for lack of subject-matter jurisdiction does not. As *Ruhrgas* concedes, dismissal for a lack of personal jurisdiction adjudicates the matter between the parties and is binding on the state court.⁹

It follows that in the removal context, when a federal district court that lacks federal subject-matter jurisdiction dismisses instead for want of personal jurisdiction, it impermissibly wrests that decision from the state courts. This follows from the fact that because, after remand,

⁹ "It has long been the rule that principles of res judicata apply to jurisdictional determinations – both subject matter and personal. See *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *Stoll v. Gottlieb*, 305 U.S. 165 (1938)." *Insurance Corp. of Ireland*, 456 U.S. at 702 n.9; see also *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990) (citing the same).

such a case would have to remain within the state courts, see, e.g., *Healy*, 292 U.S. at 270, questions of personal jurisdiction necessarily would fall within the state courts' exclusive, residual jurisdiction. Those courts are entitled to their own, independent – and absent a controlling Supreme Court decision – even conflicting interpretation of their state's long-arm statute and of the minimum contacts requirements of the federal Due Process Clause.¹⁰

A federal court's decision that it lacks subject-matter jurisdiction, by contrast, returns the case to the state court so that it can adjudicate or dismiss. That decision does not intrude on "[t]he power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts. . . ." *Healy*, 292 U.S. at 270.

Contrary, therefore, to *Ruhrgas*'s statement at oral argument that we are merely "reliev[ing] the state court of the burden of ruling on personal jurisdiction," the discretionary rule threatens the Article III principles of separation of powers and federalism in the context of a removed case. In sum, a federal court can remand a

¹⁰ Cf., e.g., *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("Under [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States."); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 342 (1816) ("It was foreseen, that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognisance of cases arising under the constitution, the laws and treaties of the United States.").

removed case for lack of subject-matter jurisdiction without offending the right and residual power of a state court to adjudicate, or dispose of, that case, but the federal court cannot do the same by assuming that it has subject-matter jurisdiction in order to reach an easier personal jurisdiction issue.¹¹

C.

The usurpation of the state courts' residual jurisdiction to adjudicate the personal jurisdiction question is not the only reason for eschewing a discretionary rule in the removal context. A discretionary rule may also create incentives for defendants to subvert the orderly scheme for removing cases by acting opportunistically.

State-court defendants who face, at the margin of existing precedent, a more plaintiff-friendly due-process/minimum-contacts jurisprudence in state court could, under the discretionary rule, manufacture a convoluted

¹¹ Implicit in Ruhrgas's advocacy of a discretionary rule in the removal context is the notion that a defendant's right of removal is of the same dignity as the plaintiff's choice of forum. "The defendant's right to remove and the plaintiff's right to choose the forum are not equal, [however,] and uncertainties are resolved in favor of remand." 16 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.05, at 107-24 through 107-25 & nn. 5, 6 (3d ed. 1997) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104-07 (1941)). This presumption in favor of remand underscores that in the removal context, where the plaintiff chose state court, that court's interest in adjudicating the issue of personal jurisdiction, absent federal subject-matter jurisdiction, must be given special consideration.

theory of federal subject-matter jurisdiction, remove to federal court, and then take advantage of a stricter interpretation of personal-jurisdiction requirements in federal court, to have the case dismissed rather than remanded. The effect may be not only to reward the defendant's manipulation but also to make *our* interpretation of the state long-arm statute, and of the federal minimum contacts analysis, the default for the state courts in this circuit, whereas in the usual course, these state courts would be entitled to have their own interpretation of state and federal law, which would be reviewable only by the state courts and ultimately by the Supreme Court.

D.

We also find the discretionary rule unpersuasive in this case because its justification – judicial efficiency – is less weighty than are other, constitutionally based concerns. A principled discretionary rule also may not be very efficient.

First, our desire for efficiency cannot override separation-of-powers concerns. The latter rationale is of constitutional import, while the former is not: "[S]eparation of powers was adopted in the Constitution 'not to promote efficiency but to preclude the exercise of arbitrary power.' Time has not lessened the concern of the Founders in devising a federal system which would likewise be a safeguard against arbitrary government." *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959) (quoting *Myers v. United States*, 272 U.S. 52, 240, 293 (1926) (Brandeis, J., dissenting)). Indeed, this court has forcefully recognized this distinction: "We are fully aware of the inefficiency and

expense to which these [parties] are being subjected . . . [but w]e cannot avoid this result [of remanding to state court for lack of subject-matter jurisdiction], for the rules of federal jurisdiction, while sometimes technical and counterintuitive, are strict and mandatory." *Oliver*, 789 F.2d at 343 (Higginbotham, J.).

Second, even if we were to fashion a discretionary rule, there is no certainty that it would be more convenient to district courts than the formulation we adopt today. Because we would wish to draw a discretionary rule in harmony with the constitutional principles that we have outlined, any resulting rule often would cause district courts to spend more time and effort than previously, when considering whether personal jurisdiction should be decided before subject-matter jurisdiction. In any given case, it might be more efficient for a district court to address the tough legal issues of subject-matter jurisdiction rather than to engage in a difficult balancing inquiry regarding personal jurisdiction.

IV.

Therefore, as the panel stated, in a case such as this one, "[t]he appropriate course is to examine for subject matter jurisdiction constantly and, if it is found lacking, to remand to state court if appropriate, or otherwise dismiss." *Marathon*, 115 F.3d at 318 (citing *Ziegler v. Champion Mortgage Co.*, 913 F.2d 228 (5th Cir. 1990)). Such a methodology respects the limits that Congress has placed on the federal courts to adjudicate cases. It also accords the proper respect to the state courts, as the residual

courts of general jurisdiction, to make the personal jurisdiction inquiry when we lack either constitutional or statutory subject-matter jurisdiction over a removed case. *See Healy*, 292 U.S. at 270.

V.

A.

Our holding not only is supported by the aforementioned constitutional precepts, but also is grounded in our prior caselaw. Today we follow our holding in *Ziegler v. Champion Mortgage Co.*, 913 F.2d 228, 229-30 (5th Cir. 1990).

In *Ziegler*, a plaintiff sued in state court alleging a breach of contract. *See id.* at 229. The defendants removed, asserting diversity jurisdiction. *See id.* When the plaintiff moved to remand because diversity jurisdiction was lacking, defendant Champion Mortgage moved to dismiss for want of personal jurisdiction. *See id.* That motion to dismiss was granted; the motion to remand was never addressed, because the district court concluded that its dismissal rendered the remand motion moot. *See id.* Final judgment was entered for the other defendants on the merits, and the plaintiff appealed. We *sua sponte* found complete diversity lacking and vacated the judgment. *See id.*

In doing so, we reiterated that "[f]ederal courts are courts of limited jurisdiction; therefore, we have a constitutional obligation to satisfy ourselves that subject matter jurisdiction is proper before we engage in the merits of an

appeal." *Id.* Our action of vacating the dismissal of Champion Mortgage for lack of personal jurisdiction established that the district court should have resolved subject-matter jurisdiction before entertaining the attack on personal jurisdiction.

The Ziegler court was aware that this part of its ruling could be perceived to be in tension with *Walker v. Savell*, 335 F.2d 536, 538 (5th Cir. 1964), in which we had stated that "the federal court had a right to consider the motion to quash service and determine the jurisdictional question before remanding the case to the state court." *Id.* The Ziegler court, however, found *Walker* distinguishable, because *Walker* dealt only with a choice between deciding a personal jurisdiction challenge and a remand motion based on a defect in *removal* jurisdiction, not one based on a defect in *subject-matter* jurisdiction. See *Ziegler*, 913 F.2d at 230.

"It is beyond doubt that although the parties can waive defects in removal, they cannot waive the requirement of original subject matter jurisdiction – in other words, they cannot confer jurisdiction where Congress has not granted it." *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1546 (5th Cir. 1991). The defendant in *Walker* was unable to remove to federal court *not* because there was no federal subject-matter jurisdiction, but because 28 U.S.C. § 1441(b) prohibits removal by an in-state defendant in diversity cases.¹² Such a removal defect is waivable if

¹² See *Walker*, 335 F.2d at 539 (observing that "this case was, under the terms of the removal statute, unquestionably in the district court even though later subject to a proper motion for remand").

not timely asserted by the plaintiff. See 28 U.S.C. § 1447(c); *In re Shell Oil Co.*, 932 F.2d 1518, 1522-23 (5th Cir. 1991).

Contrariwise, in this case, neither party contends that the plaintiffs challenged removal on the basis that the defendant had failed to meet the waivable requirements of the removal statutes. Rather, the plaintiffs argue that the district court would lack subject-matter jurisdiction had the plaintiffs originally brought this case in federal court. Such an objection is not subject to waiver, see *Baris*, 932 F.2d at 1546, and is, as explained above, a more fundamental concern of the district court than is a waivable defect.

When subject-matter jurisdiction is not in question, accordingly, we continue to believe that the district court should enjoy the freedom outlined in *Walker* to decide which waivable jurisdictional defect to address in the first instance. "Thus, resting as it does on the broader issue of subject matter jurisdiction, our decision today does not affect this Court's holding in *Walker v. Savell*." *Ziegler*, 913 F.2d at 230.

B.

Ruhrgas also argues that our rejection of the discretionary rule would be inconsistent with the well-settled principle that federal courts have jurisdiction to conduct discovery, to issue sanctions, to hold a trial, and to assess costs, even though they may lack subject-matter jurisdiction. See, e.g., *Willy v. Coastal Corp.*, 503 U.S. 131, 135-36 (1992) (upholding FED. R. CIV. P. 11 sanctions even though

the district court eventually concluded that it lacked Article III jurisdiction). The flaw with this argument, however, is that the functions to which Ruhrgas points do not have the adverse consequences of making a case-dispositive decision for the state court.

Should a federal court without statutory subject-matter jurisdiction issue sanctions, assess costs, hold a trial, or conduct discovery, any subsequent remand and proceedings that follow in state court will remain unaffected by those federal court actions. Such is not the case when a federal court dismisses for want of personal jurisdiction. In the instant case, for example, the dismissal for lack of personal jurisdiction not only ends all federal court litigation, but also ends all litigation in the state court to which the case would otherwise be remanded.¹³

C.

1.

We granted en banc review in part to resolve the conflicting precedents of this court, for *Ziegler* conflicts with *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1494 (5th Cir. 1993), and *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559, 566-67 (5th Cir. 1993).¹⁴

¹³ Given existing caselaw, the federal court's determination that there was no personal jurisdiction would be preclusive on the state court from which the case was removed. See *supra* note 9 (citing cases).

¹⁴ In accordance with our rule of orderliness, subsequent panels cannot overrule prior panels, absent en banc review or a change in law by Congress or the Supreme Court. See, e.g., *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997).

In *Asociacion Nacional*, the district court denied plaintiffs' motion to remand for want of subject-matter jurisdiction and proceeded to dismiss for lack of personal jurisdiction. See *Asociacion Nacional*, 988 F.2d at 563. On appeal, a panel of this court decided that the court had erred in failing to remand, as there was no federal subject-matter jurisdiction. See *id.* at 563-66. Instead of vacating the dismissal for lack of personal jurisdiction and remanding with instructions to remand to state court, the panel affirmed. See *id.* at 566-67.

The panel began its analysis by noting the "conceptually troubling" proposition that we could "sustain[] an order by the district court in a case over which the court did not have subject matter jurisdiction." *Id.* at 566. Unaware, however, that *Ziegler* had already foreclosed an expansion of *Walker* for the very "conceptually troubling" reasons that the *Asociacion Nacional* panel had identified, the panel expanded *Walker's* holding and affirmed the dismissal for lack of personal jurisdiction. *Id.* at 566-67.

A month after *Asociacion Nacional*, still another panel overlooked *Ziegler's* decision not to extend *Walker*. In *Villar*, 990 F.2d at 1494, we opined that "[i]n *Walker*, we

Accordingly, *Ziegler* remains good law, even in the face of *Villar* and *Asociacion Nacional*. Nonetheless, and especially in view of the fact that the *Asociacion Nacional* and *Villar* panels apparently were unaware of *Ziegler*, we use this en banc opportunity to eliminate any confusion.

The panel in *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1066 (5th Cir. 1992), also mentioned, in *dictum*, that *Walker* supports a discretionary rule. That observation was not essential to the holding. Accordingly, that case (shorn of its *dictum*) remains unaffected by our decision today.

clearly held that district courts have the power to rule on motions challenging personal jurisdiction before reaching motions to remand." *Id.*

For the reasons explained above, Ziegler's interpretation of *Walker* is the better one. Indeed, had the *Villar* and *Asociacion Nacional* panels made their decisions in the knowledge, and with the benefit, of Ziegler's analysis,¹⁵ they too may have reached a different result.

2.

Ruhrigas argues that turning back the reach of *Walker* would conflict with the view of the Second Circuit, which has adopted a discretionary rule. See *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155 (2d Cir. 1996).¹⁶ We find

¹⁵ Although *Ziegler* was decided three years prior to *Asociacion Nacional* and *Villar*, neither opinion mentions *Ziegler*.

¹⁶ See also *Cantor Fitzgerald*, 88 F.3d at 155 ("In our opinion, the District Court properly exercised its discretion in first deciding the motion to dismiss for lack of personal jurisdiction over the defendants before considering the question of federal subject-matter jurisdiction."). The Seventh Circuit, as well, mentioned and assumed a *Villar*-type interpretation of *Walker*, but ultimately expressed no opinion on the matter. See *Allen v. Ferguson*, 791 F.2d 611, 616 (7th Cir. 1986) ("[E]ven assuming *arguendo* that the *Walker* rule is correct, we find that the district court erred in deciding *Ferguson*'s motion to dismiss for want of personal jurisdiction before determining whether there was complete diversity."). That court also stated, in passing, that the district court could have discretion to decide an easier personal jurisdiction challenge before addressing questions about its subject-matter jurisdiction when the federal and state courts'

Ruhrigas's concerns unjustified; its reliance on *Cantor Fitzgerald* is misplaced, as we now explain.

First, *Cantor Fitzgerald* conflicts with an earlier Second Circuit opinion, *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674 (2d Cir. 1990), in which that court held that "[t]he court below mistakenly passed on the asserted absence of personal jurisdiction over the Guaranty Association defendants. Where, as here, the defendant moves for dismissal under Rule 12(b)(1), Fed.R.Civ.P., as well as on other grounds, 'the court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined.' " *Id.* at 678 (quoting 5 CHARLES A. WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (1st ed. 1969)). In light of *Rhulen*, the Second Circuit appears to have internally inconsistent views on this issue.¹⁷

standards for personal jurisdiction would render the same conclusion that no personal jurisdiction exists. See *id.* at 615.

Although this rule is appealing because it recognizes the comity interests inherent in any exercise of the district court's discretion, ultimately we find this conclusion "conceptually troubling." *Asociacion Nacional*, 988 F.2d at 566. Admittedly, when we have proper jurisdiction, we often apply state courts' interpretations of their own laws under a "no harm, no foul" type rule (That is, we assume the state court would not change its interpretation of its own law in the case before us). When we lack subject-matter jurisdiction, however, we should leave the state courts free to apply their own law, as well as federal law, as they have interpreted it in the past, or as they wish to reinterpret it in the present.

¹⁷ Compare *Rhulen*, 896 F.2d at 675-76 ("[T]he order below will be affirmed but on the ground that the Court lacks subject

Second, the *Cantor Fitzgerald* court grounded its holding primarily on *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151, 159-60 (2d Cir. 1990).¹⁸ *Muszynski* was one of the cases adopting the now-discredited "doctrine of hypothetical jurisdiction" – finding that a federal court could reach an easier merits question before addressing a harder subject-matter jurisdiction challenge. See *Steel Co.*, 118 S.Ct. 1012 (citing *Muszynski* for this proposition). Once a court has determined that it can pretermitt its jurisdiction to reach the merits, the decision to pretermitt subject-matter jurisdiction to reach personal jurisdiction is easily made. As the Second Circuit has recently recognized, however, *Muszynski* is no longer good law after *Steel Co.* See *Fidelity Partners, Inc. v. First Trust Co.*, 1998 U.S.App. LEXIS 8072, at *14-*15 (2d Cir. Apr. 27, 1998) (Nos. 97-9589L, 97-963CON).

In sum, not only are the cases that Ruhrgas cites to support its advocacy of a discretionary rule in a case such as ours "conceptually troubling," *Asociacion Nacional*, 988 F.2d at 566, but they are also aberrational. Accordingly,

matter jurisdiction, which precludes consideration of the existence of personal jurisdiction."), with *Cantor Fitzgerald*, 88 F.3d at 155.

¹⁸ The *Cantor Fitzgerald* court also relied on *Can v. United States*, 14 F.3d 160, 162 n.1 (2d Cir. 1994), and *Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 584 n. 2 (2d Cir. 1993). Neither of these cases, however, supports *Cantor Fitzgerald's* holding. *Can* discusses which subject-matter jurisdiction challenge a district court should address first. See *Can*, 14 F.3d at 162 n.1. *Bi* adopts no rule, but instead addresses subject-matter jurisdiction before considering personal jurisdiction. See *Bi*, 984 F.2d at 584 n.2.

we decline to follow their lead and instead adopt the reasoning of *Ziegler* and *Rhulen*.

VI.

We now address some of Ruhrgas's other arguments. Specifically, we discuss the fairness implications for the removing defendant; the applicability of the minimum-contacts analysis in determining whether subject-matter jurisdiction exists; and the argument that our rule may have the effect of unnecessarily entangling the federal courts in difficult issues of state law and the state courts in issues of federal law.

A.

We are mindful that the personal-jurisdiction requirement embodies a rule of fundamental fairness for defendants. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985). We therefore appreciate Ruhrgas's argument that it would be unfair to force the defendant, which we assume *arguendo* is not subject to personal jurisdiction in any court, to litigate, upon removal, subject-matter jurisdiction in federal court only to be forced to return to state court to litigate personal jurisdiction there (if federal subject-matter jurisdiction is found not to exist).

We find this argument ultimately unpersuasive, however. The defendant's action in seeking to invoke the jurisdiction of the federal courts, through removal, indicates its willingness – indeed, its preference – to litigate the issue of subject-matter jurisdiction, a question on

which it has the burden of proof.¹⁹ Had the issue of personal jurisdiction been more easily resolved in its favor than was the question of subject-matter jurisdiction, the defendant had the option to save itself the time and expense of litigating federal subject-matter jurisdiction by litigating the easily-resolved personal jurisdiction challenge in the state courts before removal. In any case, the fundamental-fairness requirement of personal jurisdiction will still be examined – by either state or federal court – after the district court has made its inquiry into subject-matter jurisdiction.²⁰

¹⁹ See *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365 (5th Cir. 1995) (citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921)).

²⁰ We recognize that there may be a few instances in which “the jurisdictional facts are too intertwined with the merits to permit the [remand motion] determination to be made independently . . . [thus forcing the court to] leave the jurisdictional determination to trial.” 2 JAMES W. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 12.30[3], at 12-37 (3d ed. 1998). Although many of the same considerations we express today may apply to such cases, other concerns may arise as well. Because the instant case deals solely with the decision to exercise discretion to address personal jurisdiction first because the legal issues of subject-matter jurisdiction are more complex than the legal issues surrounding personal jurisdiction, we have no occasion to opine on what rule should apply when the facts needed to support subject-matter jurisdiction are so “intertwined with the merits” of the case that they must await trial.

We also do not mean to straightjacket the district courts by designating what proceedings they may conduct, or in what order those proceedings must be conducted, when there is a pending issue as to subject-matter jurisdiction. Accordingly, while the *Ruhlen* court and professors Wright and Miller opine

B.

Ruhrgas also argues that, in cases like the instant one, our determination of subject-matter jurisdiction depends on an analysis of personal jurisdiction. See *Villar*, 990 F.2d at 1494-95. Because we are going to have to conduct the minimum contacts inquiry in any event, Ruhrgas avers, we might as well do it at the outset.

Specifically, Ruhrgas contends that Norge is included as a plaintiff solely to defeat federal diversity jurisdiction. One of the ways in which Ruhrgas attempts to prove that Norge has been “fraudulently joined” is to show that Norge could assert no claims against it. See *Marathon*, 115 F.3d at 319. To show that Norge has no viable claim, Ruhrgas argues that Norge could not subject Ruhrgas to service of process – that is, personal jurisdiction – in Texas state court.

Assuming, *arguendo*, that *Villar* correctly found that the minimum contacts analysis is relevant to a fraudulent joinder analysis, it does not alter our obligation to decide questions of subject-matter jurisdiction at the outset. For instance, assume that the district court determines that because Norge cannot serve Ruhrgas, Norge has been

that a court should consider a rule 12(b)(1) challenge first, see *supra*, we read this to mean that the court must rule on the subject-matter jurisdiction challenge first. In their discretion, however, the courts are free to allow various aspects of the proceedings to go forward, as efficiency and fairness may dictate. “The district court is free to decide the best way to deal with [matters covered by rule 12(b)], because neither the federal rules nor the statutes provide a prescribed course.” 2 MOORE ET AL., *supra*, § 12.50, at 12-102 through 12-103.

fraudulently joined. It does not follow that we should allow the district court the discretion to address personal jurisdiction first. Rather, in such a case, given the principles we have outlined above, the district court should find federal diversity subject-matter jurisdiction to exist, and proceed to decide the personal jurisdiction challenge without fear of trampling on the state courts' residual domain.

C.

Ruhrgas maintains that the rule we adopt could entangle federal courts unnecessarily in difficult decisions of state law joinder, and state courts in the federal law of personal jurisdiction. Specifically, Ruhrgas first argues that it plans to raise fraudulent joinder to establish diversity jurisdiction; the court's analysis will require the resolution of complex areas of state law. Second, Ruhrgas claims that the question of personal jurisdiction does not interfere with the state courts' autonomy, as the Texas long-arm statute reaches as far as the Constitution permits;²¹ the inquiry, thus, is one of constitutional, not state, law.

Although we appreciate Ruhrgas's first argument, our adoption of it would create incentives for defendants in Ruhrgas's position to act opportunistically in the removal context. Essentially, the defendant's argument is that because it plans to invoke a convoluted theory of

²¹ See *Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990) (interpreting the Texas long-arm statute to reach the federal constitutional limit).

subject-matter jurisdiction to support removal – one requiring difficult interpretations of state law – we should dispense with its need to prove that federal subject-matter jurisdiction exists and proceed to grant it a dismissal for lack of personal jurisdiction. We find that argument unappealing.

We dispense with Ruhrgas's second argument even more expeditiously. As we have already described, Article III envisions state courts as the default for all claims, based in both state and federal law. See *Healy*, 292 U.S. at 270; *supra* part II. Where Congress has not extended federal subject-matter jurisdiction, we should respect the Article III default of residual state court jurisdiction. See, e.g., 13 *WRIGHT, ET AL., supra*, § 3522, at 61-62. Therefore, although the ultimate issue might prove to be one of federal law, we may not deprive state courts of their authority to pass on that question.²²

VII.

A.

We end by noting that our ruling today applies only to removed cases and is otherwise limited as mentioned above. Cases brought originally in the federal courts may raise other issues that we do not face in the instant case,

²² Cf. *Tafflin*, 493 U.S. at 467 ("[W]e note that, far from disabling or frustrating federal interests, '[p]ermitting state courts to entertain federal causes of action facilitates the enforcement of federal rights.'") (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 n.4 (1981)).

so any opinion as to those issues would, as a consequence, be premature.

B.

We also understand that the district court's decision to address the personal jurisdiction question at the outset was reasonably made, given the state of our existing precedent. Because of the novelty of some of the subject-matter jurisdiction claims, and because our court has been understandably pre-occupied in reconciling the confused state of our precedent concerning a district court's obligations, we remand the issue of whether there exists federal subject-matter jurisdiction to the able district court for its determination in the first instance.²³

The judgment is VACATED, and this cause is REMANDED with instruction to address the motion to remand to state court for lack of federal subject-matter jurisdiction, and for other proceedings, as appropriate, consistent with this opinion.²⁴

²³ Although the district court may consider the panel opinion persuasive on the question of subject-matter jurisdiction, that opinion has been vacated and thus is no longer binding precedent, *see* 5TH CIR. R. 41.3; *United States v. Manges*, 110 F.3d 1162, 1173 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1675 (1998), and we express no opinion on that issue.

²⁴ Ruhrgas's motion to strike the plaintiffs' response to the amici filings is DISMISSED as moot.

PATRICK E. HIGGINBOTHAM, Circuit Judge, with whom KING, JOLLY, DAVIS, JONES, DUHÉ and BARKSDALE, Circuit Judges, join, dissenting:

Until the decision of the panel in this case, affirmed today by the majority, no appellate court in the United States had held that federal district courts may never dismiss a case for lack of personal jurisdiction without first deciding their subject matter jurisdiction. We elaborate the principles behind the regimen that had been in place in our circuit, concluding that the majority's claim of federalism on the facts before us is impoverished, a cape for unauthorized appellate rule making.

I.

Marathon Oil Company (MOC) is an Ohio corporation with its principal place of business in Houston, Texas. In 1976, MOC's affiliate, Marathon International Oil (MIO), purchased two European concerns, Pan Ocean and its subsidiary Pan Norge, who collectively held a North Sea gas production license. Pan Ocean later became Marathon Petroleum Norway (MPN), while Pan Ocean Norge was later renamed Marathon Petroleum Norge (Norge). The gas production license gave the Marathon companies the rights to 24% of the Heimdal gas field in the North Sea.

According to the Marathon plaintiffs, starting in the 1970's, Ruhrgas, A.G.; Statoil; and various other European companies secretly conspired to monopolize the gas market in Western Europe. Ruhrgas is Germany's primary gas production firm, while Statoil, Norway's state-owned gas company, has held since 1975 a 40% interest in

the Heimdal field. The plaintiffs allege that the conspirators planned to control the Western European gas market by channeling a large portion of North Sea gas reserves through Ruhrgas's production facilities in Germany.

As part of this "plan," Ruhrgas entered into an agreement in 1984 with MPN concerning the Heimdal gas field. Pursuant to the Heimdal Agreement, MPN was to drill gas from the Heimdal field and transfer it to the Ruhrgas plant in Germany. In exchange, Ruhrgas promised to provide MPN with premium prices for its gas and guaranteed pipeline transportation tariffs. The Heimdal Agreement contained a clause binding its signatories to arbitration in Stockholm, Sweden, under Norwegian law. The plaintiffs claim that Ruhrgas never had any intention of honoring its commitments under the Agreement.

The Marathon plaintiffs in this case, MOC, MIO, and Norge, were not formal parties to the Agreement, and they purport not to be seeking its enforcement in this litigation. Rather, the Plaintiffs allege that Ruhrgas's representations regarding the Agreement duped them into investing in their subsidiary, MPN, \$300 million for the development of the Heimdal field and the erection of an underseas pipeline to the Ruhrgas plant in Germany. According to the plaintiffs, this investment played right into Ruhrgas's hands; after having expended such enormous sums to construct a pipeline between the Heimdal field and the Ruhrgas plant, the Marathon companies had no choice but to sell the Heimdal gas to Ruhrgas on terms dictated by Ruhrgas. Norge additionally asserts that the value of its license to produce Norwegian gas, dependent upon the Ruhrgas-MPN contract, was also held hostage by Ruhrgas.

Allegedly, Ruhrgas later failed to honor the premium prices and tariffs that it had promised to MPN. Thereafter, MOC, MIO, and Norge sued Ruhrgas in Texas state court for fraud, misrepresentation, civil conspiracy, and tortious interference with business relationships. Ruhrgas removed the case to federal court, invoking both diversity and federal question jurisdiction, as well as the statutory provision for the removal of cases relating to arbitration agreements falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *see* 9 U.S.C. § 205. Once in federal court, Ruhrgas moved for a stay of proceedings pending the European arbitration of MPN's case, but the district court denied Ruhrgas's request. Ruhrgas then moved to dismiss the case for lack of personal jurisdiction and on grounds of *forum non conveniens*, while Marathon countered by moving to remand for lack of subject matter jurisdiction. The district court, relying on long-standing Fifth Circuit precedent, *see, e.g., Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964), opted to decide first Ruhrgas's challenge to personal jurisdiction. The court granted Ruhrgas's motion to dismiss for lack of personal jurisdiction, rendering the plaintiffs' motion to remand moot. The court later denied Ruhrgas's motion to reconsider its previous decision not to stay all proceedings pending arbitration.

Both parties appealed. Despite the fact that the district court had dismissed the case for want of personal jurisdiction, a panel of our court held that it could not ignore the plaintiffs' challenge to subject matter jurisdiction. *See Marathon Oil Co. v. Ruhrgas, A.G.*, 115 F.3d 315, 317-19 (5th Cir. 1997). Concluding that subject matter jurisdiction was indeed lacking, the panel vacated the

judgment of the district court and ordered the case remanded to state court.

II.

A.

No rule of civil procedure denies a federal district court the discretion to dismiss a case for want of jurisdiction by footing its decision upon a lack of personal jurisdiction rather than subject matter jurisdiction. A range of discretion to choose the basis for a dismissal for want of jurisdiction has long been recognized, and no court, until the panel opinion, had said otherwise. *See, e.g., Wilson v. Belin*, 20 F.3d 644, 651 n.8 (5th Cir.), *cert. denied*, 513 U.S. 930 (1994); *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1494 (5th Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994); *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559, 566-67 (5th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994); *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1066 (5th Cir.), *cert. denied*, 506 U.S. 867 (1992); *Walker*, 335 F.2d 536.¹ The practice has been so

¹ The majority opinion misreads the facts of *Walker*. The majority contends that *Walker* dealt only with the technical scope of the removal statute, for "[t]he defendant in *Walker* was unable to remove to federal court not because there was no federal subject-matter jurisdiction, but because 28 U.S.C. § 1441(b) prohibits removal by an in-state defendant in diversity cases." Majority op. at 18. Yet there were two defendants in *Walker*. The in-state defendant removed by invoking federal question jurisdiction, and the out-of-state defendant did so by citing diversity jurisdiction. *See Walker*, 335 F.2d at 538 ("Asserting that a separable controversy was alleged against Savell, arising under the laws of the United States, and in view of the non-resident status of Associated Press, the suit was

commonplace that only two other circuits have even had the occasion to address the issue, despite its regular appearance on the dockets of federal trial courts across the country. *See, e.g., Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155 (2d Cir. 1996); *Allen v. Ferguson*, 791 F.2d 611, 615 (7th Cir. 1986).² Practices do not become legitimate by

removed to United States District Court. . . ."). *Walker* makes no mention of the in-state defendant rule because that rule was irrelevant.

² Both *Cantor* and *Allen* agreed that district courts have discretion to dismiss for lack of personal jurisdiction in lieu of remanding for a lack of subject matter jurisdiction. It is true, as the majority opinion notes, that *Cantor* cites to a case advocating the now-overruled "hypothetical jurisdiction" doctrine. *See Cantor*, 88 F.3d at 155 (citing *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151 (2d Cir. 1990)). Yet *Cantor* did not premise its holding on the notion of "hypothetical jurisdiction," and the sensible comments the *Cantor* court made about personal jurisdiction were untouched by *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1012 (1998). The majority's conclusion that *Cantor* conflicted with the earlier Second Circuit opinion in *Rhulen Agency, Inc., v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674 (2d Cir. 1990), is in error. *Cantor* expressly distinguished *Rhulen* on the basis that the personal jurisdictional defect in *Rhulen* was not easier to resolve than the defect in subject matter jurisdiction. The majority opinion makes no mention of the fact that *Cantor* treated and distinguished *Rhulen*. Judge Newman was a member of both panels. Our view of Second Circuit law is controlled by what that circuit says it is.

Although the *Allen* court declined to embrace "the broader reading of *Walker*," *Allen*, 791 F.2d at 615, the *Allen* court at least assumed that in certain circumstances a district court could dismiss for want of personal jurisdiction rather than remand for a defect in subject matter jurisdiction. Otherwise, it need never have conducted an analysis of the relative complexities of the alleged jurisdictional defects before it. *See id.* at 616.

virtue of their long standing. Yet for the simple truth that we stand on the shoulders of those before us, if for no other reason, we must be hesitant when we act on recent flashes of "new" insight to the fundamentals of governance.³

The majority reverses course and holds that district courts possess no discretion to decide issues of personal jurisdiction before those of subject matter jurisdiction. This contention inexplicably relies upon an obvious and settled, but irrelevant proposition: federal courts are without the authority to decide the merits of a case when they lack subject matter jurisdiction. *See, e.g., B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 548 (Former 5th Cir. 1981). Relatedly, the argument continues, courts must raise the issue of subject matter jurisdiction *sua sponte*, *see, e.g., Trizec Properties, Inc. v. United States Mineral Prods. Co.*, 974 F.2d 602 (5th Cir. 1992); and parties may not waive defects in subject matter jurisdiction, *see, e.g., California v. LaRue*, 409 U.S. 109, 112 n.3 (1972). The argument points to a recent decision of the Supreme Court repudiating the practice of "assuming" [subject matter jurisdiction] for the purpose of deciding the merits." *Steel*

³ The majority opinion relies heavily on *Ziegler v. Champion Mortgage Co.*, 913 F.2d 228 (5th Cir. 1990). Judge Gee in *Ziegler* was presented with a *merits judgment* rendered against two defendants, both of whom were from the same state as the plaintiff. The third defendant had long since been dismissed for a want of personal jurisdiction, a dismissal that was not before Judge Gee. The *Ziegler* panel thus did the obvious thing and vacated the judgment for a want of diversity jurisdiction. A suggestion that the situation facing Judge Gee is somehow analogous to the one before us is mistaken.

Co. v. Citizens for a Better Environment, 118 S.Ct. 1003, 1012 (1998). The *Steel Co.* Court stressed that "the requirement that jurisdiction be established as a threshold matter . . . is 'inflexible and without exception,' " *id.* (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)), and that "[w]ithout jurisdiction the court cannot proceed at all in any cause," *id.* (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). The plain lack of relevance in this contention teases us to look for more, for surely more there must be.

Ultimately the majority derives from this case law an ordering of jurisdictional concepts headed by subject matter jurisdiction, with the correlative that federal courts must always resolve challenges to subject matter jurisdiction before challenges to personal jurisdiction. The contention that subject matter jurisdiction exists above personal jurisdiction in some hierarchy of jurisdictional importance is untenable. It sees personal jurisdiction in a subordinate role, nigh a merit determination. This contention misunderstands jurisdiction. Justice Holmes put it succinctly: "The foundation of jurisdiction is physical power." *McDonald v. Mabee*, 243 U.S. 90, 91 (1917). Personal and subject matter jurisdiction do not differ in relevant ways. As we will explain, a federal district court is powerless to decide the merits of a case if it lacks either subject matter or personal jurisdiction. Both jurisdictional requirements are rooted in constitutional commands of case or controversy and due process. And both are implemented by the Congress. As Justice O'Connor recognized in *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833 (1986), Article III protects both personal and structured interests.

It simply cannot be gainsaid that "[t]he validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties." *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 701 (1982) (emphasis added); see also *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938). As the Supreme Court noted in 1937, personal jurisdiction is as integral to the power of a federal court as is subject matter jurisdiction:

Counsel for the petitioner assume that the presence of the defendant was not an element of the court's jurisdiction as a federal court; but the assumption is a mistaken one. By repeated decisions in this Court it has been adjudged that the presence of the defendant in a suit *in personam*, such as the one now under discussion, is an essential element of the jurisdiction of a district (formerly circuit) court as a federal court, and that in the absence of this element the court is powerless to proceed to an adjudication.

Employers Reinsurance Corp. v. Bryant, 299 U.S. 374, 382 (1937) (footnote omitted and emphasis added). Indeed, the requirement that federal courts possess personal jurisdiction over the parties is not derived from extralegal judicial concerns about fairness or equity; rather, it is rooted in the Due Process Clause of the Constitution. See *Compagnie des Bauxites*, 456 U.S. at 702.

Subject matter jurisdiction is best understood as a structural right, for "it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign." *Id.* Personal jurisdiction, on the other hand, is an "individual liberty interest" which "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Id.* This

difference accounts for the fact that personal jurisdiction may be waived by the parties, whereas subject matter jurisdiction may not. Compare *Commodity Futures Trading Comm'n*, 478 U.S. at 850-51 (noting that structural rights may not be waived), with *Compagnie des Bauxites*, 456 U.S. at 703 (noting that individual rights may be waived).⁴ From this principle follows naturally the rule that defects in subject matter jurisdiction must be raised by a court *sua sponte*, while deficiencies in personal jurisdiction need not. Where the parties do not challenge personal jurisdiction, their failure can be construed as a functional waiver, whereas parties cannot waive subject matter jurisdiction by their silence. The simple fact that personal jurisdiction is subject to waiver, however, does not somehow function to elevate subject matter jurisdiction in status. Both are critical to the power of a court; both are rooted in core constitutional precepts.

There is sequence to be sure. Questions of standing and subject matter jurisdiction are usually engaged at the outset of a case, and often that is the most efficient way of going. The majority's effort to support a mandated sequence, however, rests on a flawed vision of the relationship between Article III and the power of the inferior courts. It is true that Article III limits disputes that Congress can assign to the federal courts, both in terms of

⁴ Even this description of the difference between subject matter and personal jurisdiction is an overstatement. Personal jurisdiction can express territorial limits, akin to securing sovereign interests. The structured protections of subject matter jurisdiction are heavily influenced by consent. See *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Commodity Futures Trading Comm'n*, 478 U.S. 833.

case or controversy and in terms of disputes finally resolvable by courts. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792). It is equally true that Article III grants to Congress the authority both to create inferior courts and to confer so much of the jurisdiction authorized by Article III that Congress chooses. The multi-purposed role of Article III with the hand of Congress at every turn belies the assertion that personal jurisdiction enjoys lesser regard than subject matter jurisdiction – Due Process as opposed to Article III. Thus, when federal courts examine our subject matter jurisdiction, we are ordinarily construing the jurisdiction-authorizing statutes present in Title 28 of the U.S. Code, not Article III or any power flowing directly from it. Indeed, one of the attacks upon jurisdiction pointed to here as a defect in subject matter jurisdiction – a lack of complete diversity – is not itself a requirement of Article III, but rather suffers from want of a jurisdictional grant by Congress. In the literal sense then, personal jurisdiction rests more immediately upon a constitutional command than does a want of complete diversity. Contrary to the majority's suggestion, there is no subordinate role for personal jurisdiction in these fundamentals of our federalism.

Although the majority heavily relies upon the inapposite *Steel Co.* decision, it is in fact the majority that cannot square its opinion with recent Supreme Court jurisprudence. In *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467 (1996), a unanimous Court employed long-standing precedent to hold that a district court's judgment may stand in a removed case even if the court lacked subject matter

jurisdiction at the time of removal, so long as the jurisdictional defect was cured by the time of judgment. In *Caterpillar*, upon removal there was a lack of complete diversity between the parties, but this defect was later cured by the district court's subsequent dismissal of a nondiverse defendant following a settlement between the parties. Indeed, the plaintiff in *Caterpillar* explicitly objected to jurisdiction shortly after removal, an objection that was erroneously overruled by the trial court. The majority opinion in this case travels against *Caterpillar*, for its absolutist approach to subject matter jurisdiction would suggest that every decision entered by the *Caterpillar* district court following the improper removal, from the dismissal of the nondiverse party to the entry of final judgment, was void. If the Supreme Court tolerates a capture of jurisdiction through the dismissal of a settling party by a court that lacked subject matter jurisdiction, surely it permits a district court to dismiss a case for want of personal jurisdiction, before considering a challenge to subject matter jurisdiction.

It is well settled that federal courts have jurisdiction to determine their own jurisdiction. *See, e.g., Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1078 (7th Cir. 1987). In the end, the majority concludes that this "jurisdiction to determine jurisdiction" does not encompass "jurisdiction to determine personal jurisdiction"; that a court without subject matter jurisdiction lacks the power to dismiss the case for lack of personal jurisdiction. As we have stated, there is no authority, either in the Constitution or the case law, to support this conclusion. Ironically, if the district court lacked the power to dismiss for want of personal jurisdiction because it lacked (had not

decided) subject matter jurisdiction, the dismissal would have no binding effect on the state court. Yet binding effect is the premise of the majority's invoking of federalism.

B.

Much is made here of the fact that this case was removed from state court. Indeed, the majority opinion attempts to limit itself to removal situations.⁵ It is presumed that removal is an affront to states' interests and federalism. This argument fails to grasp the centrality of removal in our complex of state and federal courts. Removal jurisdiction is an integral part of our federalism, having been present since the Judiciary Act of 1789. Sec. 14, The Judiciary Act of 1789 (1 Stat. 73). Indeed, in the famous and early debate about the scope of federal jurisdiction in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), both sides proceeded from the assumption that removal was a fundamental, and noncontroversial, aspect of our federalist judicial system. *See id.* at 348-51 (Story, J.); *id.* at 378 (Johnson, J., concurring).

In 28 U.S.C. §§ 1331 & 1332, Congress allocated the concurrent jurisdiction of the federal and state courts. Congress has periodically expanded the scope of removal

⁵ Even assuming that there is, however, a hierarchy among jurisdictional issues grounded upon the structural limits ("Article III limits") of the federal courts' authority, as the majority opinion asserts, no principle justifies a distinction between cases removed to federal court and cases filed there originally. If the majority opinion's rule is true for removal, it is true for every form of federal jurisdiction.

jurisdiction where it was believed necessary to afford federal defendants or interests a federal forum or otherwise to promote uniformity in federal law. *See, e.g.*, 28 U.S.C. § 1443 (civil rights removal statute). Under this system, the statutory scheme is tilted toward adjudication of removable cases in federal court,⁶ for state proceedings may not go forward unless both parties agree to forsake federal jurisdiction. Under 28 U.S.C. § 1441, defendants (unless they are local defendants) have the unilateral right to remove cases from the state courts. Similarly, if a plaintiff files a removable case in federal court, there is no corresponding statutory provision permitting the defendant to remand the case to state court. Accordingly, contrary to the position taken by the majority opinion, there is no substantive distinction between cases removed and those originally filed in federal court; both reflect a party's choice not to proceed in state court. Neither situation represents a constitutional misallocation of power to federal courts at the expense of state courts.

Absent bad-faith removal, a federal court's decision to address a defect in personal jurisdiction before one in subject matter jurisdiction therefore does not somehow frustrate the plaintiff's choice of forum, for Congress explicitly limits the presumptive status of concurrent jurisdiction by defining a defendant's right of removal. Its federal defenses aside, a defendant has a right equal to the plaintiff to invoke the jurisdiction of the federal court

⁶ Of course, we are to construe the removal statute narrowly. *See Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988). Yet when removal applies, it places the state/federal forum decision in the defendant's hands.

for decision of the plaintiff's claims. Thus, so long as federal subject matter jurisdiction is nonfrivolously invoked, federalism offers no reason to distinguish between first engaging personal or subject matter jurisdiction. The removal statute itself contemplates removal before any state court adjudication of personal jurisdiction. Cf. 28 U.S.C. § 1448 (permitting first service of process after removal); 14A Wright & Miller, § 3721, at 228-29 ("A defendant . . . may move to dismiss for lack of personal jurisdiction after removal.") (notice of removal must be filed within thirty days of receipt of initial pleading). Courts frustrate no federalism principles when they address the constitutional issues of personal jurisdiction before addressing subject matter jurisdiction in a removed case.

C.

Of course, even though subject matter and personal jurisdiction are of equal importance to a federal court, challenges to one must inevitably be decided before challenges to the other. That said, the choice of a district court, its exercise of discretion, should be guided by familiar considerations. Here concerns such as efficiency and avoiding abuse of rights of removal become relevant – and indeed on the proper facts, so does federalism.

State and federal courts are equally competent to decide issues of personal jurisdiction, where those issues turn on federal constitutional law. See *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976). In a diversity case, when a federal district court grants a motion to dismiss for want of personal jurisdiction over a non-resident of the forum

state, the ruling precludes the state court from deciding again the personal jurisdictional issue. See *Baldwin v. Iowa State Traveling Men's Assoc.*, 283 U.S. 522, 524-27 (1931) (concluding that federal court determinations as to personal jurisdiction are *res judicata* in subsequent litigation in state court). Simultaneously, it leaves subject matter jurisdiction for a second federal forum that has personal jurisdiction over the parties. Yet although this reality of the rules of preclusion is important, it is not determinative of whether a district court may move directly to the issue of personal jurisdiction.

In our view a district court should ordinarily first satisfy itself of its subject matter jurisdiction. Nonetheless, we would continue to hold that there are limited circumstances under which it may be more appropriate for the federal court to decide the issue of personal jurisdiction first. The case before us today is a good example.

When a challenge to personal jurisdiction is relatively straightforward and does not involve complex state-law questions, but the alleged defect in subject matter jurisdiction raises difficult issues of law, a district court's concerns for federalism may give way to its self-restraint. In general, district courts must avoid ruling on difficult, complex, or novel matters, if an easier and equally appropriate ground for decision is available to them. See *Allen*, 791 F.2d at 615 ("Of course, in keeping with the notions of judicial restraint, federal courts should not reach out to resolve complex and controversial questions when a decision may be based on a narrower ground."). At the same time, resolving a simple

matter of personal jurisdiction, premised on federal constitutional law, intrudes little upon the domain of state courts. If a federal court should determine that an issue of personal jurisdiction is resolved easily in favor of a defendant, little is accomplished, and much is wasted, by a remand to state court to permit that tribunal to come to the same conclusion.

True, such a course of action "precludes" the state court from deciding the issue of personal jurisdiction. Yet it is inevitable in our dualistic but hierarchical system of federal and state courts that the state courts will occasionally, for efficiency's sake, be deprived of the opportunity to pass on certain matters otherwise available to them; indeed, the very concept of supplemental jurisdiction is premised on this notion. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) ("[Supplemental jurisdiction's] justification lies in considerations of judicial economy, convenience, and fairness to litigants. . . .").⁷ Where, as here, the issue precluded from decision is a relatively simple question of federal law, blind invocations of "federalism" should give way to more sensible uses of judicial discretion. Of course, efficiency concerns cannot offer a justification for a federal court to reach the merits of a dispute in the absence of federal jurisdiction, personal or subject matter. There must be jurisdiction to decide the merits. That is what jurisdiction is. See *Oliver v.*

⁷ The contours of the discretion that we would reaffirm mirror closely the contours of district courts' discretion to exercise their supplemental jurisdiction. See 28 U.S.C. § 1367(c) (directing district courts to avoid supplemental claims that predominate over federal claims or raise novel or complex issues of state law).

Trunkline Gas Co., 789 F.2d 341, 343 (5th Cir. 1986) (a position reaffirmed by the Supreme Court a decade later). But given that there exists no "jurisdictional hierarchy," efficiency concerns can instruct the decision to dismiss for a defect in one jurisdictional basis as opposed to another.

Apart from the comparative simplicity of the challenges to a case's jurisdictional bases, other factors should inform a district court's decision to determine the order in which jurisdictional defects are addressed. The majority suggests that defendants might manufacture claims to subject matter jurisdiction in order to obtain a federal forum to hear their attacks on personal jurisdiction. Yet as the cases dismissed by the majority have recognized, district courts should opt to address challenges to personal jurisdiction only when removal is not frivolous and is made in apparent good faith. See *Pescadores*, 988 F.2d at 566-67. On the other hand, oftentimes the question of subject matter jurisdiction turns in part upon the presence of personal jurisdiction. In such situations, it is even more appropriate to resolve the objections to personal jurisdiction first. See *Villar*, 990 F.2d at 1494-95.

D.

We would reaffirm today that district courts possess discretion to address challenges to personal jurisdiction before it addresses subject matter jurisdiction. Courts typically should first confirm their subject matter jurisdiction. However, we believe that they may opt instead to resolve defects in personal jurisdiction when the attack

on personal jurisdiction presents a question of federal law that is far more easily resolved than a challenge to subject matter jurisdiction, when the defendant's removal is not frivolous and is made in apparent good faith, and when the challenge to personal jurisdiction does not raise significant issues of state law or the attack on subject matter jurisdiction does. Furthermore, in those situations in which the question of subject matter jurisdiction turns in part upon the presence of personal jurisdiction, it would again be appropriate to resolve the objections to personal jurisdiction first.

Recognizing that district courts possess a level of discretion is enormously preferable to the majority's alternative, a mechanical and rigid ordering of decision-making. We cannot see around corners, nor can we predict the infinite variety of cases that may one day come before our district courts. Rules that lack flexibility are often vices in and of themselves when dealing with trial courts. Given that we are not constitutionally compelled to craft a rigid standard for determining the order in which jurisdictional defects are addressed, we should eschew the invitation to invent one through appellate rulemaking. The very nature of the work of a federal trial judge here makes discretion a value in itself. Relatedly, we must not forget that sequencing, when required, has been by rulemaking, a cooperative enterprise of Congress and of the courts. Indeed, the courts acting alone crafted a set of rules for the exercise of pendent jurisdiction, only to conclude that the enterprise was the task for Congress. See *Finley v. United States*, 490 U.S. 545 (1989).

III.

Thus, we would hold that district courts possess discretion to consider motions challenging personal jurisdiction before those challenging subject matter jurisdiction. The sensible way in which this discretion had operated in our circuit until the panel opinion below is illustrated by the district court's handling of this case.

On the one hand, the plaintiffs' attack on subject matter jurisdiction before the district court raised an issue of first impression in this circuit. Although they challenged subject matter jurisdiction on multiple grounds, the plaintiffs' most troubling arguments were leveled against 9 U.S.C. § 205, which permits removal in cases "relating to" international arbitral agreements. According to the plaintiffs, their case in no way "related to" such an agreement because they were not seeking to enforce the underlying Heimdal Agreement between MPN and Ruhrgas. Ruhrgas, on the other hand, contended that the phrase "related to" pulls more cases into a federal court's removal jurisdiction than just those seeking to enforce the arbitral agreement itself. Disregarding Ruhrgas's other bases for removal, Ruhrgas's invocation of § 205 was certainly not frivolous. Furthermore, considering the mountain of amicus filings before our court criticizing the panel's interpretation of § 205, the plaintiffs' opposition to federal subject matter jurisdiction was a difficult one to address, implicating novel questions of law in this circuit. Finally, the presence of subject matter jurisdiction, at least as it related to diversity, turned in part on the question of the fraudulent joinder of Norge, a foreign corporation, as a plaintiff suing Ruhrgas, another foreign corporation. See *Corporacion Venezolana de Fomento*

v. Vintero Sales Corp., 629 F.2d 786, 790 (2d Cir. 1980) (noting that the presence of aliens on both sides of the case defeats diversity jurisdiction), *cert. denied*, 449 U.S. 1080 (1981). This issue overlapped with the question of personal jurisdiction.⁸ In the end, the issues of subject matter jurisdiction are so complex that the majority opinion declines to address them, despite the full treatment given to them by the panel below. See *Marathon Oil*, 115 F.3d at 318 (describing the subject matter jurisdiction issue as "formidable").⁹

On the other hand, Ruhrgas's challenge to the court's personal jurisdiction was relatively straightforward. Ruhrgas contended that it lacked the requisite minimum contacts with Texas to support jurisdiction from a Texas court. Ruhrgas's motion required the district court only to consider the reach of the Texas long-arm statute, Tex. Civ. Prac. & Rem. Code § 17.042, which is governed by the federal Constitution's Due Process Clause. See *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 200 (Tex. 1985). No substantial questions of purely state law were presented. Accordingly, the federal district court was at least as competent as any state court to decide the personal jurisdictional issue. In addition, as demonstrated

⁸ Norge would have to establish personal jurisdiction over Ruhrgas based on Ruhrgas's contacts with Texas that were pertinent to damaging the value of Norge's licence [sic] to produce Norwegian oil.

⁹ Norge also asserted subject matter jurisdiction based on a federal law of international relations, insofar as Marathon's complaint implicated the actions of sovereign-owned Statoil, the Norwegian gas company.

below, the merits of Ruhrgas's challenge to personal jurisdiction could be resolved relatively easily in its favor.

Thus, the district court, in taking up personal jurisdiction, did not abuse what heretofore had been its discretion. Indeed, the majority does not suggest that it did. Although it parted from standard practice in not first resolving the attack on subject matter jurisdiction, the factors we have outlined above all supported the court's exercise of its discretion.

IV.

In the end, the majority's opinion is nothing more than an exercise in unauthorized judicial rulemaking. In the pursuit of a vindication of its view of federalism principles, the majority withdraws discretion from district courts and replaces it with a rigid sequencing of decisions, despite the absence of any constitutional, statutory, or jurisprudential compulsion to do so. In doing so, the majority ignores the Congress and pays little attention to the host of legal doctrines, from the Due-Process basis of personal jurisdiction to the *Caterpillar* rule to the concept of supplemental jurisdiction, that contradict its new rule of procedure. The Federal Rules of Civil Procedure address the issue of the order in which the defenses of lack of subject matter and lack of personal jurisdiction will be raised. Rules 12(b)(1) and (2) include both as preliminary defenses. The Rules of Civil Procedure regulate in various ways the order of conducting proceedings, including various pre-trial disputes over discovery, summary judgment, and trial itself. The majority does nothing more than pronounce an addendum to

Rule 12(b). This undertaking will rightfully be criticized as an imperial view of judicial roles and a confusion of life tenure with insight. We respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY,)	
MARATHON INTERNATIONAL)	
OIL COMPANY, AND)	
MARATHON PETROLEUM	)	CIVIL ACTION
NORGE A/S,	)	NO. H-95-4176
)	
Plaintiffs,)	
)	
vs.)	
)	
RUHRGAS, A.G.,)	
)	
Defendant.)	

MEMORANDUM AND ORDER

Pending before the Court in the above styled case are:

- (1) Ruhrgas, A.G.'s ("Ruhrgas") Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(2) (Instrument #4) for lack of personal jurisdiction;
- (2) Ruhrgas's Motion to Dismiss on *Forum Non Conveniens* Grounds (Instrument #8);
- (3) plaintiffs Marathon Oil Company ("Marathon"), Marathon International Oil Company ("MIOC"), and Marathon Petroleum Norge A/S's ("Norge") Motion to Remand (Instrument #12); and
- (4) Ruhrgas's Motion for Reconsideration of Order Denying Motion for Stay Pending Arbitration, or in the Alternative, To Vacate and

Defer Ruling Pending Discovery (Instrument #39).

The parties have performed discovery on these jurisdictional motions and have had the opportunity to fully brief the issues. Additionally, the Federal Republic of Germany has filed an Amicus Brief in Support of Ruhrgas (Instrument #58). Although the amicus brief at best only reasserts Ruhrgas's arguments, the plaintiffs have filed a response to the brief. After considering the parties' submissions, the record in the case, and the relevant law, the Court concludes that Ruhrgas's motion to reconsider the motion to compel arbitration should be denied, Ruhrgas's motion to dismiss for lack of personal jurisdiction should be granted, this case should be dismissed, and the plaintiffs' motion to remand and Ruhrgas's motion to dismiss for *forum non conveniens* should be denied as moot.

I. Factual Background

The basis of the case is the development of the natural gas, Heimdal Field ("the field"), located in the Norwegian North Sea. The plaintiffs' affiliate, Marathon Petroleum Company (Norway) ("MPCN") entered into an agreement with Ruhrgas to sell its share of the gas from the field to Ruhrgas. The plaintiffs maintain that Ruhrgas and non-party Statoil conspired to have MPCN and the plaintiffs pay for the development of the field and then lock MPCN into the agreement, which was not profitable. The plaintiffs claim that they have suffered losses due to the loans they made to MPCN as a result of Ruhrgas's conduct. The plaintiffs contend that Ruhrgas, by its actions with non-party Statoil, is liable to the plaintiffs

for fraud, tortious interference with prospective business relationships, participation in breach of fiduciary duty, constructive fraud, and civil conspiracy.

II. Arbitration of Claims

It is undisputed that the agreement between MPCN and Ruhrgas contains an arbitration clause. The arbitration clause provides in pertinent part that:

All claims, disputes and other matters arising out of or relating to this Agreement which the Parties are unable to resolve by mutual agreement . . . shall exclusively and finally be settled by arbitration in Stockholm, Sweden. . . .

Heimdal Gas Sales Agreement at article 15 (Instrument #1, Exhibit B, Exhibit 2 (filed under seal as Instrument #3)). With respect to the instant motion, the main dispute is whether the arbitration clause is binding on the plaintiffs, who admittedly did not sign the agreement.

Ruhrgas contends that this case should be stayed pending arbitration pursuant to sections 1 and 3 of Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *reprinted in* 9 U.S.C. § 201 note (West Supp. 1995) ("the Convention") and 9 U.S.C. §§ 3 and 208. The Fifth Circuit has held that the Convention contemplates a very limited inquiry by courts when considering a motion to compel arbitration:

(1) is there an agreement in writing to arbitrate the dispute; in other words, is the arbitration agreement broad or narrow;

- (2) does the agreement provide for arbitration in the territory of a Convention signatory;
- (3) does the agreement to arbitrate arise out of a commercial legal relationship; and
- (4) is a party to the agreement not an American citizen?

Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1144-45 (5th Cir. 1985) (citing *Ledee v. Ceramiche Rauno*, 684 F.2d 184, 185-86 (1st Cir. 1982)). The parties must concede that Sweden is a signatory to the Convention, the dispute arises out of a commercial legal relationship, and Ruhrgas is not an American citizen. The only requirement that is not clearly present is whether there is an agreement in writing to arbitrate the dispute.

Ruhrgas filed its initial Motion for Stay Pending Arbitration (Instrument #6) on August 28, 1995. On November 15, 1995, the Court issued an eleven page Memorandum and Order (Instrument #38) which denied Ruhrgas's motion for stay pending arbitration because it was not established that there was a written agreement whereby the plaintiffs had consented to arbitration with Ruhrgas. Soon after the denial of the motion for stay, Ruhrgas filed a Motion for Reconsideration of Order Denying Motion for Stay Pending Arbitration, or in the Alternative, To Vacate and Defer Ruling Pending Discovery (Instrument #39). In its motion to reconsider, Ruhrgas contends that the plaintiffs should be compelled to arbitration based on the virtual representation doctrine and on the "group of companies" doctrine which has been applied in France.

A. Virtual Representation Doctrine

Ruhrgas maintains that the Fifth Circuit's opinion in *Astron Indus. Assocs., Inc. v. Chrysler Motors Corp.*, 405 F.2d 958 (5th Cir. 1968), requires that this case be stayed pending arbitration. In the Memorandum and Order denying Ruhrgas's initial motion for stay, the Court rejected Ruhrgas's virtual representation argument on the basis that the plaintiffs' claims against Ruhrgas are independent of any contract claims which MPCN might have against Ruhrgas. Instrument #38 at 8-10. The relationships between the companies involved in *Astron* are similar to those in the instant case. Transcontinental Industries, Inc. had a contractual relationship with Chrysler Motors Corporation to provide parts and supplies for Chrysler. Astron Industrial Associates, Inc. acquired Transcontinental relying in large part on Transcontinental's relationship with Chrysler. Astron felt Chrysler had breached the contract with Transcontinental and authorized its legal counsel to initiate two separate lawsuits against Chrysler on behalf of each company, Transcontinental and Astron. Transcontinental ended up in bankruptcy proceedings and eventually had its suit against Chrysler dismissed with prejudice. Chrysler then sought to have the suit by Astron dismissed on the basis of *res judicata*. On appeal, the Fifth Circuit concluded that the Transcontinental and Astron lawsuits were "identical for purposes of *res judicata*. In both suits the only wrong which Chrysler allegedly committed was its failure to supply automobile parts and supplies to Transcontinental." *Astron*, 405 F.2d at 962. "Whether the theory of

recovery be misrepresentation to Transcontinental, misrepresentation to Astron, breach of contract with Transcontinental, or breach of contract with Astron, the operative wrong remains the same, the evidence necessary to sustain the allegation is the same, and a different judgment in this suit would impair rights under the earlier dismissal." *Id.* Since the two lawsuits involved the same wrong by Chrysler and were being pursued by the two related companies, the Fifth Circuit determined that the dismissal of Transcontinental's suit barred Astron from pursuing its suit. *Id.*

Ruhrgas believes that *Astron* applies to the instant case because the plaintiffs' claims allege a wrong which is the same wrong which MPCN could assert against Ruhrgas in arbitration. The Court does not necessarily agree with Ruhrgas's belief that there is only "one wrong" allegedly committed by Ruhrgas. The claims that the plaintiffs have asserted are for alleged acts of misrepresentation by Ruhrgas that induced the plaintiffs to invest money in MPCN. The claims which MPCN could assert against Ruhrgas would deal with whether Ruhrgas breached the contract between them. Assuming, *arguendo* however, that Ruhrgas has committed only one wrong with respect to the plaintiffs and MPCN, Ruhrgas's argument regarding the virtual representation doctrine is that the plaintiffs have so much control over MPCN that the plaintiffs are in privity with MPCN under the virtual representation doctrine.

Ruhrgas has provided evidence which shows that in negotiations and dealings between MPCN and Ruhrgas, MPCN was represented by individuals who were also employees of the plaintiffs. Even if the Court agreed with

Ruhrgas's argument that there is only one wrong and the plaintiffs and MPCN are in privity, Ruhrgas's case for arbitration relies on a footnote in *In re Talbott Big Foot, Inc.*, 887 F.2d 611 (5th Cir. 1989). In *In re Talbott*, the Fifth Circuit noted that whether a nonsignatory to an arbitration agreement could be compelled to arbitrate would be a closer question if the nonsignatory and signatory were in privity so that an arbitration award would have a preclusive effect against the nonsignatory. *Id.* at 614 n.4. However, *In re Talbott* involved a situation of whether a nonsignatory's action should be stayed pending the resolution of a related arbitration which might have a preclusive effect on the litigation. Thus, even *In re Talbott* does not necessarily apply in this case because MPCN has not initiated arbitration proceedings against Ruhrgas.

This situation may certainly be discouraging to Ruhrgas since the plaintiffs and MPCN might very likely have made a conscious decision that MPCN would not pursue any claims against Ruhrgas, but there would be nothing improper about the plaintiffs' doing so. The virtual representation doctrine has no application to this case and the plaintiffs are not bound by MPCN's arbitration clause on that basis.

B. Group of Companies Doctrine

Ruhrgas next argues that the plaintiffs should be bound by the arbitration clause to which MPCN agreed to based on the "group of companies" theory. This theory comes from *Dow Chemical v. Isover Saint Goban*, Cour d'Appel, Paris, 21 October 1983, 110 J. 899 (1983) TX Yearbook 131 (1984) (English translation) (a copy of the

opinion is attached to Instrument #39 as Exhibit 1 to Exhibit A), an opinion by a French arbitration panel. In *Dow Chemical*, two Dow subsidiaries had agreements with Isover which provided for arbitration. The issue resolved in *Dow Chemical* was whether the parent company, Dow Chemical (USA) and another subsidiary, Dow Chemical France, could also require that their claims against Isover be arbitrated as well. The French panel concluded that, in view of the major roles that Dow Chemical (USA) and Dow Chemical France played in executing the agreements with Isover, the arbitration agreement could be enforced by them. The panel stated that, "Considering that irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality . . . of which the arbitral tribunal should take account when it rules on its own jurisdiction. . . ." *Id.* at 136. Ruhrgas urges this Court to adopt the group of companies doctrine from *Dow Chemical* and hold that the plaintiffs in the instant case are bound by the arbitration clause executed by MPCN.

Obviously, the *Dow Chemical* opinion has no binding precedential value on this Court. Additionally, *Dow Chemical* does not squarely apply to this case. The French panel went on to state that, "Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to

which they may give rise." *Id.* (emphasis added). In the instant case, although the plaintiffs may have played a significant role in the negotiations of the contract between Ruhrgas and MPCN, it is certainly not clear that all the parties (the plaintiffs, MPCN, and Ruhrgas) intended to be bound by the arbitration clause between MPCN and Ruhrgas. Another important distinction between *Dow Chemical* and the instant case is that Dow Chemical (USA) and Dow Chemical France were trying to compel arbitration with a party which had agreed to arbitration with at least some related entity. In the instant case, however, Ruhrgas seeks to compel arbitration with the plaintiffs even though they have never consented to arbitration with Ruhrgas or any member of its group.

The Court declines to find that the plaintiffs should be compelled to arbitrate their claims with Ruhrgas based on the group of companies doctrine. Having rejected Ruhrgas's arguments in its motion for consideration of its motion for stay, the Court concludes that its denial of Ruhrgas's motion for stay pending arbitration was proper and the motion for reconsideration should be denied.

III. Discretion to Rule on Pending Jurisdictional Motions

In the Scheduling Conference held before United States Magistrate Judge Frances H. Stacy on November 6, 1995, each side of this case argued that the Court should rule on its respective jurisdictional motions without ruling on the motions of the other. In other words, the plaintiffs desired to have the Court grant their motion to remand without ruling on Ruhrgas's motions to dismiss.

Ruhrgas, on the other hand, desired to have the Court rule on the arbitration issue and/or the motions to dismiss for lack of personal jurisdiction and *forum non conveniens* before ruling on the motion to remand. At this point, the Court is faced with choosing first to rule on the plaintiffs' motion to remand, Ruhrgas's motion to dismiss for lack of personal jurisdiction, or Ruhrgas's motion to dismiss for *forum non conveniens*.

In the Fifth Circuit, the law is well settled that district courts have the power to rule on motions challenging personal jurisdiction before reaching motions to remand. *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1494 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 690 (1994). Judicial economy is served by the exercise of this power because if the district court remands the case, it has merely avoided ruling on a motion that will fall to the state court to decide. *Id.* Furthermore, it is often necessary for district to address the issue of personal jurisdiction regardless of which motion it addresses first. *Id.* The Court will first discuss Ruhrgas's motion to dismiss for lack of personal jurisdiction because the conclusion that personal jurisdiction does not exist over Ruhrgas is dispositive of the remaining motions and the case.

IV. Motion to Dismiss for Lack of Personal Jurisdiction

Pursuant to Fed. R. Civ. P. 12(b)(2), Ruhrgas moves to have the claims against it dismissed. When a defendant challenges personal jurisdiction, the plaintiffs have the burden to prove that the Court has jurisdiction over the defendant. *Colwell Realty Invs., Inc. v. Triple T Inns of*

Arizona, Inc., 785 F.2d 1330, 1332 (5th Cir. 1986). The plaintiffs must establish by *prima facie* evidence that personal jurisdiction exists over Ruhrgas. *Union Carbide Corp. v. UGI Corp.*, 731 F.2d 1186, 1189 (5th Cir. 1984). The Court may exercise personal jurisdiction over a non-resident defendant only if (1) the defendant is subject to service of process under the forum state's long-arm statute and (2) the exercise of jurisdiction comports with the due process requirements of the Fourteenth Amendment. *Colwell Realty*, 785 F.2d at 1333. Because the Texas long-arm statute, Tex.Civ. Prac. & Rem. Code § 17.042, "reaches as far as the federal constitutional requirements of due process will permit," the Court need only determine whether the exercise of personal jurisdiction over Ruhrgas satisfies the United States Constitution's due process requirements. *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2D 199, 200 (Tex. 1985).

The due process clause of the Fourteenth Amendment, as interpreted by the Supreme Court, permits the exercise of personal jurisdiction over a nonresident defendant when (1) that defendant has established "minimum contacts" with the forum state; and (2) the exercise of jurisdiction over that defendant does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

The minimum contacts prong of the test may give rise to either "specific" or "general" jurisdiction. *WNS, Inc. v. Farrow*, 884 F.2d 200, 202 (5th Cir. 1989). When the act or transaction being sued upon is unrelated to the nonresident defendant's contacts with the forum state, personal jurisdiction does not exist unless the defendant has sufficient "continuous and systematic contacts" with

the forum state to support "general jurisdiction," but a single act by a nonresident defendant directed at the forum state can be enough to confer personal jurisdiction by "specific jurisdiction" if that act gives rise to the claim being asserted. *Ham v. La Cienega Music Co.*, 4 F.3d 413, 415-16 (5th Cir. 1993) (citing *Helicopteros Nacionales de Columbia S.A. v. Hall*, 466 U.S. 408 (1984)).

The minimum contacts prong, for specific jurisdiction purposes, is satisfied by actions, or merely a single act, by which the nonresident defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Specific jurisdiction exists over a nonresident defendant only if the nonresident defendant: (1) purposefully directed his activities at the residents of the forum state, *Asahi Metal Ind. Co. v. Superior Court of Cal.*, 480 U.S. 102, 109-22 (1987), and (2) the plaintiff's claims arise out of or relate to the defendant's purposeful contact with the forum. *Burger King*, 471 U.S. at 472. The nonresident's "purposeful availment" must be such that the defendant "should reasonably anticipate being haled into court" in the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

But even if minimum contacts exist, the exercise of personal jurisdiction over a nonresident defendant will fail to satisfy due process requirements if the assertion of jurisdiction offends "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316. In determining this fundamental fairness issue, courts are to examine (1) the defendant's burden; (2) the forum state's interest; (3) the plaintiffs' interest in convenient and

effective relief, (4) the judicial system's interest in effective resolution of controversies; and (5) the state's shared interests in furthering fundamental social policies. *Asahi Metal*, 480 U.S. at 112.

In this case, the plaintiffs contend that Ruhrgas is subject to both specific jurisdiction and general jurisdiction. Expectedly, Ruhrgas argues that it is not subject to personal jurisdiction on either basis. The Court will consider each basis of personal jurisdiction *seriatim*.

A. Specific Jurisdiction

For the exercise of specific jurisdiction over a nonresident defendant to be proper, the nonresident defendant must have purposefully availed itself of the privilege of conducting activities within Texas, thus invoking the benefits and protections of its laws. *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 777 (5th Cir. 1986), *cert. denied*, 481 U.S. 1015 (1987). As stated above, specific jurisdiction exists over a nonresident defendant only if the nonresident defendant: (1) purposefully directed his activities at the residents of the forum state, *Asahi Metal*, 480 U.S. at 109-22, and (2) the plaintiff's claims arise out of or are directly related to the defendant's purposeful contact with the forum. *Wilson v. Belin*, 20 F.3d 644, 647 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 322 (1994) (citing *Helicopteros*, 466 U.S. at 414 n.8). The plaintiffs have failed to satisfy either of the prerequisites for the exercise of specific jurisdiction over Ruhrgas.

The plaintiffs maintain that Ruhrgas is subject to specific jurisdiction in Texas due to Ruhrgas's attendance at three meetings in Houston concerning the Heimdal

Field. The meetings occurred in February 1987, November 1989, and April 1990. Each of these meetings concerned the sales contract between Ruhrgas and MPCN. Bossley Deposition (Instrument #65, Exhibit 2) at 45, 48-49, 52-53, 58-60. The plaintiffs' claims concern misrepresentations and fraudulent conduct by Ruhrgas and Statoil which caused the plaintiffs to suffer losses by continuing to supply funds to MPCN. The plaintiffs' designated representative who attended all three of the Houston meetings, Mr. Burton Bossley, was unable to recall any discussion at the Houston meetings concerning the funding arrangement between the plaintiffs and MPCN. Bossley Deposition (Instrument #65, Exhibit 2) at 62-64. There is no evidence that Ruhrgas's alleged tortious conduct was aimed at Texas or that the brunt of any injury would be felt in Texas. Mr. Bossley was not even able to recall any false statements made by Ruhrgas at the Houston meetings. Bossley Deposition (Instrument #65, Exhibit 2) at 61-62.

The Court is to examine the relationship between Ruhrgas, the forum, and the litigation to determine whether jurisdiction is appropriate. *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772 (5th Cir. 1988) (citing *Holt Oil & Gas*, 801 F.2d at 777)). In view of the nature of the plaintiffs' claims and Ruhrgas's contact with Texas, the Court concludes that the exercise of specific jurisdiction over Ruhrgas would not be proper. *Southmark Corp.*, 851 F.2d at 772. Additionally, Ruhrgas's presence in Texas was related to negotiations under the contract between Ruhrgas and MPCN. Since the contract between Ruhrgas and MPCN provided for arbitration in Sweden, Ruhrgas could not have expected to be haled into Texas courts

based on these meetings. The Court is aware that the personnel for MPCN who attended the meetings in Houston with Ruhrgas wore "several hats" (i.e., the same individuals who represented MPCN also represented other Marathon entities at the same time), and Ruhrgas was possibly aware of the situation. Since there is no evidence that Ruhrgas engaged in any tortious conduct in Texas, however, Ruhrgas is not subject to specific jurisdiction based on MPCN's representatives wearing other entities' hats because Ruhrgas was in Houston due to the contract with MPCN and could only expect to have to engage in arbitration in Sweden.

B. General Jurisdiction

For a court to exercise general jurisdiction over a nonresident defendant, the defendant must have contacts with the forum state which are continuous, systematic, and substantial. *Wilson*, 20 F.3d at 649 (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 n.11 (1984)). *Perkins* is the only case in which the Supreme Court has upheld the finding of general jurisdiction. *Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.*, 1 F.3d 848, 851 n.3 (9th Cir. 1993). "The leading Supreme Court case on general jurisdiction is *Helicopteros*. . . ." *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 181 (5th Cir. 1992), cert. denied, 506 U.S. 1080 (1993). In order to determine whether Ruhrgas's contacts constitute the kind of continuous and systematic general business contacts to support general jurisdiction, the Court must explore the nature of Ruhrgas's contacts with Texas. *Helicopteros*, 466 U.S. at 415-16.

The plaintiffs contend that Ruhrgas is subject to general jurisdiction based on the following contacts with Texas. In 1994, Ruhrgas acquired a twenty percent share of Houston based Tenneco Energy Resources Corporation ("TERC") for \$47 million. Instrument #63, Exhibit 11. The purchase of the TERC stock was negotiated in Houston. Benke Deposition (Instrument #63, Exhibit 12) at 41. Ruhrgas has one member on the five member board of directors of TERC. *Id.* at 7. The Ruhrgas board member and two other Ruhrgas officials travel to Houston three times each year for TERC's board meetings. Benke Affidavit (Instrument #5, Exhibit D). These individuals from Ruhrgas also attend about nine other meetings per year in Houston in relation to TERC which appear to have occurred on combined trips. Instrument #63, Exhibit 12 at 15, 65-67, 69-70. Ruhrgas personnel have possibly traveled to Texas for meetings with various US oil companies. *Id.* at 77-78. Ruhrgas maintains an employee training program with TERC wherein young low-level Ruhrgas employees are temporarily assigned to work in Houston for TERC under TERC's direction. Falkenhausen Deposition (Instrument #63, Exhibit 21). These employees are generally paid by TERC, unless the assignment to TERC is for less than a year, in which case Ruhrgas continues to pay them. *Id.* at 19. While the employees are assigned to TERC, Ruhrgas pays them overseas bonuses and salary differentials, subsidizes Houston housing expenses, and subsidizes the employees' children's educational expenses in Houston. *Id.* at 15, 19, 20, 21, 26. The plaintiffs also point out that while the Ruhrgas employees are assigned to TERC, they are considered to simultaneously be employees of Ruhrgas. Instrument #63, Exhibit 25. The

plaintiffs have provided a summary of Ruhrgas's purchase orders from April 1983 through October 1995 which reveal about one million dollars in purchases in Texas during the last twelve years. Instrument #63, Exhibit 26. Additionally, it appears that Ruhrgas has paid over \$700,000 to a Dallas based firm for reservoir evaluation services over the last twenty years. Instrument #63, Exhibit 27. Based on these contacts with Texas, the plaintiffs maintain that Ruhrgas has systematic and continuous contacts with Texas that will support general jurisdiction over Ruhrgas.

With respect to Ruhrgas's stock ownership of TERC and its participation in TERC related activities, it is settled that even complete stock ownership and common officers and directors are not sufficient to attribute the contacts of one entity to another. *Dunn v. A/S Em. Z. Svitzer*, 885 F.Supp. 980, 985 (S.D.Tex. 1995) (citing *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1987)). Therefore, Ruhrgas's ownership interest in TERC is not a factor in determining continuous and systematic contacts in Texas. With respect to Ruhrgas's employees that are assigned to TERC, the Fourth Circuit in *Ratliff v. Cooper Lab., Inc.*, 444 F.2d 745 (4th Cir.), *cert. denied*, 404 U.S. 948 (1971), held that general jurisdiction did not exist over a nonresident defendant in spite of the defendant having five salesmen living in the forum state who promoted the defendant's products to customers in the forum state. In the instant case, the Ruhrgas employees that are assigned to work in Houston are not doing work for Ruhrgas. They are working for TERC on TERC projects. The Court concludes that the presence of the Ruhrgas employees in Houston provides an even less

compelling basis to support general jurisdiction over Ruhrgas than did the salesmen in *Ratliff*.

The remaining contacts that Ruhrgas has with Texas (*i.e.*, training sessions and purchases in Texas) do not support general jurisdiction based on *Helicopteros*. Similar contacts with Texas were found to be insufficient to support general jurisdiction in *Helicopteros*. *Helicopteros* was a wrongful death case brought in Texas state court against *Helicopteros*, a Colombian corporation, after a helicopter crash in Peru. The Supreme Court held that *Helicopteros* was not subject to general jurisdiction in Texas in spite of: (1) its CEO having attended a meeting in Texas; (2) its having accepted checks drawn on a Texas bank; (3) its employees attending training sessions in Texas; and (4) its having made four million dollars in purchases from a Texas business during a seven year period. Ruhrgas's attending meetings in Texas and purchasing less than two million dollars in products and services from Texas businesses falls short of the level of contacts that *Helicopteros* had with Texas which the Supreme Court held were insufficient to establish general jurisdiction. Therefore, Ruhrgas has not had systematic and continuous contacts with Texas which subject it to general jurisdiction in Texas.

Because the Court has concluded that there is no general or specific jurisdiction over Ruhrgas, the Court need not consider whether the exercise of jurisdiction over Ruhrgas would comport with traditional notions of fair play and substantial justice.

V. Conclusion

In accordance with the foregoing, the Court hereby

ORDERS that Ruhrgas's Motion for Reconsideration of Order Denying Motion for Stay Pending Arbitration, or in the Alternative, To Vacate and Defer Ruling Pending Discovery (Instrument #39) is **DENIED**; and

ORDERS that Ruhrgas's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(2) (Instrument #4) for lack of personal jurisdiction is **GRANTED**.

The Court further

ORDERS that the plaintiffs' Motion to Remand (Instrument #12) and Ruhrgas's Motion to Dismiss on *Forum Non Conveniens* Grounds (Instrument #8) are **DENIED as moot**.

SIGNED at Houston, Texas, this 29th day of March 1996.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

MARATHON OIL COMPANY,	§	
MARATHON INTERNATIONAL	§	
OIL COMPANY, and	§	
MARATHON PETROLEUM	§	CIVIL ACTION
NORGE A/S,	§	NO. H-95-4176
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
RUHRGAS, A.G.,	§	
	§	
Defendant.	§	

ORDER OF DISMISSAL

In accordance with the Court's Memorandum and Order of this day granting defendant Ruhrgas, A.G.'s motion to dismiss for lack of personal jurisdiction, the Court hereby

ORDERS that this case be **DISMISSED** for lack of personal jurisdiction over defendant Ruhrgas, A. G.; and

ORDERS that Ruhrgas, A.G. shall recover its costs of court.

SIGNED at Houston, Texas, this 29th day of March, 1996.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

(2)

No. 98-470

FILED

NOV 6 1998

IN THE
Supreme Court of the United States

OFFICE OF THE CLERK
SUPREME COURT, U.S.

OCTOBER TERM, 1998

RUHRGAS AG,

Petitioner,

v.

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
and MARATHON PETROLEUM NORGE A/S,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a case properly filed in state court and removed by the Defendant to federal court, may a district court ignore a challenge to federal subject matter jurisdiction, conduct discovery, and enter an order of dismissal without ever determining the basis, if any, of federal subject matter jurisdiction?

JURISDICTIONAL STATEMENT

STATEMENT OF THE CASE

- A. Facts
- B. The Issues
- C. The Motion to Remand for Lack of Federal Jurisdiction
- D. The Appellate Court's Decision

SUMMARY OF OPINIONS

REASONS FOR DENYING THE WRIT

- I. THE FIFTH CIRCUIT CORRECTLY AFFIRMED THE DISMISSAL OF THIS CASE
- A. Subject Matter Jurisdiction is a Threshold Issue, Decided by the Federal District Court
- B. Defendant's Removal Was Properly Made
- C. Defendant's Motion to Remand Was Properly Denied

- II. THERE IS NO COMPLAINT WITH THE DISMISSAL

RULE 29.6 DISCLOSURE

Marathon Oil Company, Inc. ("Marathon") is a subsidiary of USX Corp. Marathon International Oil Company ("MIOC") is wholly-owned by Marathon. Marathon Petroleum Norge A/S is a Norwegian Corporation whose stock is held by a wholly-owned affiliate of MIOC.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-470

RUHRGAS AG,
v. *Petitioner,*

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
and MARATHON PETROLEUM NORGE A/S,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

There is no jurisdiction. Every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934); *see also Juidice v. Vail*, 430 U.S. 327, 331-32 (1977) (standing). "And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits, but merely for the purpose of correcting the

error of the lower court in entertaining the suit." *United States v. Corrick*, 298 U.S. 435, 440 (1936) (footnotes omitted).

Congress directed that a case "shall" be remanded immediately whenever it appears that the district court lacks removal jurisdiction. 28 U.S.C. § 1447(c). It also directed that an order of remand "is not reviewable on appeal or otherwise" because such delay would unduly interfere with the operations of the state courts. *Id.* § 1447(d). Despite the comity concerns and despite the conclusion of the Fifth Circuit panel that there was never federal jurisdiction in this case, the basis for federal jurisdiction is still unknown. The Fifth Circuit *en banc* did not address the issue, and the district court has been unwilling or unable, despite the Fifth Circuit's mandate and direct requests for a ruling, to rule regarding the existence of federal jurisdiction. Even if this Court does not find any issue in this case worthy of certiorari, it can and should consider the question whether this case is properly before this or any other federal court.

STATEMENT OF THE CASE

A. Background

On July 6, 1995, Respondents Marathon Oil Company ("Marathon"), Marathon International Oil Company ("MIOC"), and Marathon Petroleum Norge ("Norge") filed this case in Texas state court, alleging conspiracy, fraud, and participation in a breach of fiduciary duty. Marathon and MIOC alleged that Petitioner defrauded them into loaning hundreds of millions of dollars for the development of the Heimdal gas field based on misrepresentations and fraudulent omissions contained in hundreds of letters sent by Petitioner to them in Houston, Texas over a multi-year period. Petitioner also traveled to Marathon's Houston, Texas headquarters for three in-person meetings concerning the matter.

Norge is a Norwegian corporation and an affiliate of Marathon and MIOC. It owns the production license for the Heimdal field. Norge alleges that the value of its license has been diminished by Petitioner's refusal to permit Heimdal gas to be sold to *any* buyers who are not members of Petitioner's cartel known as the "Consortium." It also alleged that Petitioner participated in breaches of fiduciary duties owed to Norge by its joint venture partner, Statoil (the Norwegian oil and gas company). These matters, too, were the subject of the three in-person Houston meetings and correspondence directed to Respondents in Texas.

Respondents' claims arise from, or directly relate to, deliberate contacts by Petitioner with the forum. Furthermore, Petitioner has maintained its own employees living and working in Houston for many years. None of Respondents' claims present a federal question; instead, they are garden-variety tort claims arising under Texas law.

B. The Removal

Petitioner removed the case on August 21, 1995.¹ Despite the absence of any apparent basis for federal subject matter jurisdiction, Petitioner alleged both federal question and diversity jurisdiction. First, it urged that an arbitration agreement made the case removable; a position contradicted by sworn statements in its own removal papers that "Ruhrgas has never entered into any agreement with any of the Plaintiffs concerning gas produced from the Heimdal field or any of the matters that are the subject of . . . this action." Ex. B to Notice of Removal. The District Court rejected the argument that the case could be stayed pending arbitration in the absence of any consent to arbitrate.

¹ Petitioner to date has not filed an answer, offered any sworn denial, or answered discovery relating to the essential allegations of this lawsuit.

Petitioner next argued that the case presented issues of such international significance that no state court should be permitted to hear it. According to Petitioner, the federal common law of "international relations" provided a basis for removal independent of any congressional statute. The District Court never addressed this contention; the Fifth Circuit panel rejected it. App. A.

Finally, Petitioner asserted that diversity jurisdiction existed. Because Norge and Petitioner both are aliens, however, there is no diversity. Although Petitioner nakedly asserted that Norge was "fraudulently joined," the only evidence on the point established that (1) Norge actually owns the relevant production license, (2) Norwegian law requires that a Norwegian company like Norge hold the license, and (3) Norge contends the value of its license has been diminished by Petitioner's refusal to permit Heimdal gas to be sold to *anyone* other than the "Consortium." Norge also alleges that Petitioner participated in breaches of fiduciary duties owed to Norge by its partner, Statoil (the Norwegian oil and gas company). Thus, Norge obviously has a sufficient interest in the case to avoid any serious assertion that its joinder here was somehow "fraudulent." Accordingly, all three novel arguments for removal jurisdiction are, and since the time of removal in August 1995 have been, lacking in any colorable merit.

C. The Motion to Remand for Lack of Federal Jurisdiction

On September 15, 1995, Respondents moved to remand, pointing out the absence of federal subject matter jurisdiction apparent from the face of the petition. On that same date, Respondents also moved to stay the case pending a determination of the existence of federal subject matter jurisdiction. That motion urged that subject matter jurisdiction be resolved as a threshold matter and, in view of the assertion of both federal question and diversity jurisdiction, the basis, if any, of subject matter

jurisdiction had to be resolved before it could be determined whether personal jurisdiction would relate to Petitioner's contacts with Texas or the United States. FED. R. Civ. P. 4(k)(2). The District Court denied that request.

Instead, the District Court granted Petitioner's request to have "discovery" to identify grounds for its removal and to support its various motions, including its personal jurisdiction challenge. On March 29, 1996, the court dismissed for lack of personal jurisdiction, reasoning that there was no proof that a tort had been committed by Petitioner's representatives while they were physically present in Marathon's Houston offices. The court never addressed whether there was any basis for federal subject matter jurisdiction.

D. The Appeal and First Petition for Certiorari

At oral argument, the Fifth Circuit panel expressed no particular enthusiasm for the personal jurisdiction holding, and pressed counsel for both parties to explain (1) why this case was in the federal courts and (2) why it was necessary to reach personal jurisdiction at all. It ruled, on June 10, 1997, that it lacked subject matter jurisdiction and that the case should be remanded to state court. Petitioner then filed a petition for writ of certiorari asserting that the case should be arbitrated. This Court denied the Petition on November 10, 1997. App. B. Following this Court's denial of certiorari, the Fifth Circuit *sua sponte* set the case for *en banc* reconsideration.

On June 22, 1998, the *en banc* court handed down the decision at issue in this second Petition. It rejected the former rule, finding it inconsistent with congressional policy reflected throughout the removal statutes and decisions of this Court concerning both removal and the power of the inferior courts under Article III. The *en banc* court remanded to the District Court for a ruling on the

Motion to Remand. On July 17, 1998, the Fifth Circuit rejected Petitioner's Motion to Stay the Mandate pending this Petition. As of the date of this filing, despite renewed requests, the District Court has not ruled whether subject matter jurisdiction exists.

SUMMARY OF OPPOSITION

This effort at interlocutory review does not present any novel issue, nor are the principles involved the subject of any actual circuit conflict. The Petition questions whether a federal court can ignore a challenge to its subject matter jurisdiction and rule instead on a motion to dismiss for lack of personal jurisdiction. Petitioner asserts that so long as the personal jurisdiction question is "easier," then a federal court may ignore a "difficult" question of subject matter jurisdiction in the interests of judicial economy. Respondents submit that, at least in removed cases, subject matter jurisdiction is a fundamental threshold issue that must be decided before a federal court can rule on any other matter.

This Court has already resolved, on occasions too numerous to count, that federal subject matter jurisdiction must be determined as a threshold matter. This is especially true of removed cases. Any rule to the contrary would run counter to the limited jurisdiction afforded the lower courts in Article III of the Constitution and by Congress in the removal statutes. It also would create the potential, realized in this case, for prolonged delay in remanding cases improvidently removed from state court dockets.

The Fifth Circuit was correct in rejecting a rule that would permit a district court to ignore the question whether federal subject matter jurisdiction exists while it retains a case for discovery and, perhaps, dismissal for lack of amenability to service of process. The dismissal entered in this case was erroneous and was subject to

correction on appeal. Nonetheless, a rule that would endorse this procedure would leave the threshold question of state or federal jurisdiction unanswered for years.

The Fifth Circuit's opinion followed decisions of this and other courts. Accordingly, the Petition should be denied. In connection with its evaluation of this Petition, however, this Court can and should examine the basis for this case's presence in the federal system. As no such basis exists, the Court should note the absence of subject matter jurisdiction even if it determines that there is no question worthy of review of certiorari.

REASONS FOR DENYING THE WRIT

Petitioner advocates a system in which federal courts can assume subject matter jurisdiction for the purpose of disposing of a case on a merits-based, personal jurisdiction challenge. Petitioner bases this conclusion on the maxim that a federal court always has jurisdiction to determine its own jurisdiction. Respondents agree that federal courts have jurisdiction to determine jurisdiction. That, however, is not the issue. Rather, the question here is whether federal courts can ignore a lack of subject matter jurisdiction. In particular, when a district court's subject matter jurisdiction in a removed case is called into question, may it nonetheless proceed with discovery, and then enter a dispositive, merits-based judgment based on a state law question of amenability to process without ever considering whether Article III jurisdiction exists? A long line of cases, culminating with the recent opinion in *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998), establish that it cannot.

I. THE FIFTH CIRCUIT CORRECTLY APPLIED PRIOR DECISIONS OF THIS COURT

Subject matter jurisdiction lies at the very heart of federal court authority. Recognizing this important principle, the Fifth Circuit's opinion below requires federal

courts sitting in removed cases to resolve issues of subject matter jurisdiction before considering contested issues like personal jurisdiction. In reaching this conclusion, the Fifth Circuit followed the mandate that subject matter jurisdiction is a "fundamentally preliminary" and threshold issue. *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979).

A. Subject Matter Jurisdiction is a Threshold Inquiry, Especially in Cases Removed from State Court

As this Court has recognized consistently, "[f]ederal courts are courts of limited jurisdiction" acquiring power to adjudicate claims from both Article III and Congress. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982); *Aldinger v. Howard*, 427 U.S. 1, 15 (1976). Other than the Supreme Court, every federal court "derives its jurisdiction wholly from the authority of Congress," and Congress may "give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution." *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922). Thus, "[w]ithout jurisdiction the court cannot proceed at all in any cause" and "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1012 (1998) (quoting *Ex Parte McCordle*, 74 U.S. 506, 514 (1868) (emphasis added)). This threshold inquiry is all the more important when, as here, the case has been unilaterally removed from the state courts by one of the litigants.

The Court has admonished federal courts to tread cautiously when exercising subject matter jurisdiction in a case removed from state court. "The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the

rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the [removal] statute has defined.'" *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)). Indeed, to permit a federal court with no subject matter jurisdiction to enter a judgment in a removed case would "work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them." *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 18 (1951).

Cognizant of these concerns, Congress strictly limited federal removal jurisdiction and attempted to check the incentive to remove cases without jurisdiction. It required that a case not be removed until it has in fact "become removable." 28 U.S.C. § 1446(b). It mandated remand when "at any time before judgment it appears that the district court lacks jurisdiction." 28 U.S.C. § 1447(c). It authorized the entry of fee awards for improper removal and rejected any right to appeal an order of remand "no matter how plain the legal error." See *Briscoe v. Bell*, 432 U.S. 404, 413 n.13 (1977).

Every federal appellate court has been mindful of the limited nature of removal jurisdiction and the attendant potential for interference with state court proceedings. See, e.g., *Ahern v. Charter Township*, 100 F.3d 451, 454 (6th Cir. 1996) ("Due regard for state governments' rightful independence requires federal courts scrupulously to confine their own jurisdiction to precise statutory limits."); *Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 29 (3d Cir. 1985) ("Because lack of jurisdiction would make any decree in the case void and the continuation of the litigation in federal court futile, the removal statute should be strictly construed and all doubts should be resolved in favor of remand.") (quoting 14 CHARLES ALLEN WRIGHT, ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3642 (2d ed. 1985)).

Consistent with the Fifth Circuit, the Eleventh Circuit, for example, recently held that federal district courts sitting in removed cases have a mandatory duty to determine subject matter jurisdiction before considering any other dispositive motion. *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1372 n.4 (11th Cir. 1998). "To do otherwise would allow defendants to evade the statutory requirements of § 1441(b) and allow the federal courts to make significant dispositive rulings in a case over which the federal courts may lack jurisdiction." *Id.* ("Important [subject matter] jurisdictional questions cannot be ignored merely because they are difficult."). Even opposing counsels' treatise recognizes that "it would not simply be wrong but indeed would be an unconstitutional invasion of the powers reserved to the states if federal courts were to entertain cases not within their jurisdiction." 13 CHARLES ALLEN WRIGHT, ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3522 (2d ed. 1984).

Petitioner's argument not only ignores these fundamental concerns but also neglects serious comity consequences that Congress intended to address in the removal statutes. As is often the case, the personal jurisdiction question here overlapped with the merits. *See, e.g., Data Disc, Inc. v. Systems Tech. Assocs., Inc.*, 557 F.2d 1280, 1285-86 n.2 (9th Cir. 1977). Petitioner urged, for instance that its conduct while visiting Respondents' Texas offices did not amount to actionable fraud under Texas law. The District Court so ruled. Pet. App. B-15. There was, in essence, a merits-based ruling. It also was erroneous. While appeal lies to correct the error, the remand question went unresolved and has been held hostage throughout the appellate process. Had the District Court simply addressed its subject matter jurisdiction at the outset and remanded, no appeal would lie, and the severe delay inherent in the appellate process would have been avoided. *United States v. Rice*, 327 U.S. 742, 751 (1946). By ruling on personal jurisdiction and ignoring subject matter jurisdiction, a district court creates the entirely avoidable

possibility of delay occasioned by subsequent reversal on personal jurisdiction.² Likewise, even if a district court could be authorized to ignore the question of subject matter jurisdiction, an appellate court still would be bound to address the threshold issue. Either way, a remand ruling is delayed improperly despite 28 U.S.C. § 1447(c).

B. Petitioner's Proposed Rule would Conflict with *Steel Co.*

Petitioner's argument also conflicts with this Court's recent decision in *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1012-13 (1998). In *Steel Co.*, the Court, reiterating the fundamental nature of subject matter jurisdiction, rejected a Ninth Circuit rule that would have allowed a court to assume jurisdiction over a case for the purpose of disposing of it on a closely-related merits ruling. In doing so, the Court held that to decide issues in a case without first confirming subject matter jurisdiction "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id.* at 1012. The court further noted that

This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." . . . "On every writ of error or appeal, the first and fundamental question is that of jurisdiction." . . . The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception."

Id. (citations omitted).

² This case is a paradigm of such delay, by which the basic question of subject matter jurisdiction has been submerged for over three years, with no end in sight.

Even Petitioner agrees, as it must, that every federal court is required, as a threshold matter, to determine that it has "jurisdiction." Nevertheless, Petitioner argues that a court may ignore a lack of subject matter jurisdiction in order to first address the issue of personal jurisdiction. Petitioner premises its argument on the illogical conclusion that a defense to service of process that includes the term "jurisdiction" in its common name is no different from any other jurisdictional argument. "Petitioner[] fail[s] to recognize the distinction between the two concepts—speaking instead in general terms of 'jurisdiction.'" *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites des Guinee*, 456 U.S. 694, 701 (1982). The Fifth Circuit correctly rejected this "jurisdiction is jurisdiction" argument. *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 217 (5th Cir. 1998) (en banc).³

Subject matter jurisdiction and personal jurisdiction are separate and distinct concepts. The Court has instructed, for example, that "*neither personal jurisdiction nor venue is fundamentally preliminary in the sense that subject-matter jurisdiction is*, for both are personal privileges of the defendants, rather than absolute strictures on the court." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979) (emphasis added). "The distinction is that subject-matter jurisdictional requirements prevent our overreaching into the powers that the Constitution and Congress have left to the state courts, while personal jurisdiction requirements prevent both state and federal

³ The recent adoption of Petitioner's "jurisdiction is jurisdiction" argument represents an abrupt about-face for Professors Wright and Miller. Before appearing here, their statements regarding the threshold nature of subject matter jurisdiction were unequivocal. "[W]hen [a motion to dismiss] is based on more than one ground, the court should consider the Rule 12(b)(1) challenge *first*." 5A CHARLES ALLEN WRIGHT, ET AL., *FEDERAL PRACTICE AND PROCEDURE* 1350 (2d ed. 1990) (emphasis added). "Upon finding that it has no subject matter jurisdiction, the district court should strike the case from its docket." *Id.* at Vol. 13, § 3522 (2d ed. 1984 & Supp. 1998).

courts from upsetting the defendant's settled expectations as to where it can reasonably anticipate being sued." *Marathon Oil Co.*, 145 F.3d at 218 (citing *Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 702-04).

Subject matter jurisdiction, which flows from Article III of the Constitution, is an absolute boundary on a federal court's power to act. Unlike personal jurisdiction, "no action of the parties can confer subject-matter jurisdiction upon a federal court;" "the consent of the parties is irrelevant;" "principles of estoppel do not apply;" and "a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings." *Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 702 (citations omitted). On the other hand, "personal jurisdiction flows not from Art. III, but from the Due Process Clause" and represents an "individual right" that may be waived. *Id.* at 702, 703.

C. *Caterpillar* does not Hold Contrary to These Principles

Petitioner's attempt to conjure up a conflict between the Fifth Circuit's opinion and this Court's decision in *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467 (1996), is untenable. In *Caterpillar*, the defendants removed the case at a time when there was a lack of complete diversity. *Id.* at 471. The plaintiff objected to jurisdiction after removal and moved the court to remand the case. The trial court *considered the question of subject matter jurisdiction* and denied the motion, although its disposition was erroneous and would have been subject to reversal on appeal had the error remained. *Id.* The non-diverse defendant was later dropped pursuant to a settlement between the parties, and the court subsequently rendered judgment according to a jury verdict. This Court upheld the judgment, holding that the lack of complete diversity at the time of removal was later cured by the dismissal of the non-diverse defendant. *Id.* at 476-77.

Caterpillar is unlike the present case in two important ways. First, in *Caterpillar* the district court *expressly*

ruled—though incorrectly—on the plaintiff's objection to subject matter jurisdiction. In contrast, the District Court in this case *refused to rule* on Respondents' objection to subject matter jurisdiction, instead assuming that the court hypothetically had the power to retain the case, supervise discovery, and enter an order of dismissal. Second, *Caterpillar* was reviewed after final judgment. It was undisputed at that point that subject matter jurisdiction existed. Thus, the purported conflict between this case and *Caterpillar* is illusory.

II. THERE IS NO CONFLICT WITH THE SECOND CIRCUIT

Petitioner's assertion that *Cantor Fitzgerald* conflicts with the present case is flawed for at least two reasons. First, *Cantor Fitzgerald* directly conflicts with the Second Circuit's earlier opinion in *Rhulen Agency, Inc. v. Alabama Insurance Guaranty Ass'n*, 896 F.2d 674 (2d Cir. 1990). In *Rhulen*, the defendants moved the federal district court to dismiss the case for lack of subject matter jurisdiction and personal jurisdiction. *Id.* at 677. The court granted the motion, basing its decision on a lack of personal jurisdiction. On appeal, the Second Circuit held that the "court below mistakenly passed on the asserted absence of personal jurisdiction." *Id.* at 678. The court explained that where "the defendant moves for dismissal [for lack of subject matter jurisdiction], as well as on other grounds, 'the court should consider the [subject matter jurisdiction] challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and need not be determined.'" *Id.* (citing 5 CHARLES ALLEN WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (1st ed. 1969)). *Rhulen* is controlling authority in the Second Circuit.⁴ See, e.g., *United*

⁴ At least six recent Second Circuit district court cases decided since *Cantor Fitzgerald* have followed *Rhulen*. See, e.g., *United States v. Carpentieri*, No. 96-Civ.-6460, 1998 WL 749042, at *2

States v. Fatico, 603 F.2d 1053, 1058 (2d Cir. 1979) (holding that one appellate panel cannot overrule another panel); *Ingram v. Kumar*, 585 F.2d 566, 568 (2d Cir. 1978) (same). *Rhulen*, of course, is consistent with the Fifth Circuit's decision here.

Petitioner claims that *Cantor Fitzgerald* distinguished *Rhulen* by "citing it for the proposition that a district court may not first decide a challenge to personal jurisdiction *unless* the personal-jurisdiction question is easier to resolve than the subject-matter jurisdiction question." Pet. at 12. However, *Cantor Fitzgerald*'s string cite reference to *Rhulen* does not render it distinguishable. And nowhere in the *Rhulen* opinion does the Second Circuit even imply—as Petitioner now suggests—that the personal jurisdiction issue was "easier" to resolve than subject matter jurisdiction.⁵ Rather, the *Rhulen* opinion rests on one

(S.D.N.Y. Oct. 26, 1998); *Seemann v. Maxwell*, 178 F.R.D. 23, 25 n.1 (N.D.N.Y. 1998); *Madanes v. Madanes*, 981 F. Supp. 241, 249 (S.D.N.Y. 1997); *Integrated Utils., Inc. v. United States*, No. 96-Civ.-8983, 1997 WL 529007, at *2 (S.D.N.Y. Aug. 26, 1997); *Sanger v. Reno*, 966 F. Supp. 151, 159 (E.D.N.Y. 1997); *Sanchez-Preston v. Luria*, No. CV-96-2440, 1996 WL 738140, at *2 (E.D.N.Y. Dec. 17, 1996). This also has been the practice in the federal courts of Texas. E.g., *American Nat'l Ins. Co. v. Travelers Cas. and Surety Co.*, 8 F. Supp. 2d 938, 939 (S.D. Tex. 1998) ("[T]he first question for the Court is always jurisdiction. . . . If the lawsuit has come before the court via removal, upon determining that subject matter jurisdiction is lacking, the Court's only recourse is remand.").

⁵ Regardless, personal jurisdiction here could not "easily" be decided in Petitioner's favor. Respondents' state court petition alleged misrepresentations and fraudulent omissions contained in more than one hundred letters sent by Petitioner or Respondent in Houston, Texas over a multi-year period, as well as three in-person meetings at Respondents' Houston headquarters. The claims involved arise from, or directly relate to, all of these intentional contacts by Petitioner with the forum. Petitioner's actions are alleged to have caused Respondents to sustain hundreds of millions of dollars in damages in Texas. Petitioner's stationing of its own employees in Houston for many years also precluded any "easy" decision in its favor. And even if the personal jurisdiction question had been an

clear and inexorable principle: subject matter jurisdiction must be determined first. Because the Court resolves conflicts between, not within, the Circuits, any conflict between *Rhulen* and *Cantor Fitzgerald* is best left to the Second Circuit.

Second, as the Fifth Circuit observed below, Petitioner's reliance on *Cantor Fitzgerald* is misplaced because "the *Cantor Fitzgerald* court grounded its holding primarily on *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151, 159-60 (2d Cir. 1990)." *Marathon Oil Co.*, 145 F.3d at 223.⁶ *Muszynski* was a "hypothetical jurisdiction" case; its holding was invalidated by this Court's decision in *Steel Co.*, 118 S. Ct. at 1016.

In sum, the Second Circuit has reached conflicting conclusions on this issue, and the only case that Petitioner cites to support its conflict argument relied on precedent that has already been overruled by this Court. This Court should adhere to its usual role of resolving only actual conflicts and erroneous decisions. *See Holly Farms Corp. v. NLRB*, 517 U.S. 392, 397 (1996). Neither is present here.

CONCLUSION

Marathon filed this state tort action over three years ago, seeking a remedy in state court for wrongful acts occurring in and directed toward Texas. By manipulating

easy one, it still would not justify wresting a case from the state court in which it was filed.

⁶ The *Cantor Fitzgerald* court also cited *Can v. United States*, 14 F.3d 160, 162 n.1 (2d Cir. 1994), and *Bi v. Union Carbide Chemicals & Plastics Co.*, 984 F.2d 582, 584 n.2 (2d Cir. 1993). But as the Fifth Circuit pointed out, "[n]either of these cases, however, supports *Cantor Fitzgerald's* holding. *Can* discusses which subject-matter jurisdiction challenge a district court should address first. *See Can*, 14 F.3d at 162 n.1. *Bi* adopts no rule, but instead addresses subject-matter jurisdiction before considering personal jurisdiction. *See Bi*, 984 F.2d at 584 n.2." *Marathon Oil Co.*, 145 F.3d at 223 n.18.

baseless procedural hurdles throughout this case's long and tortured history, Petitioner has avoided fair resolution of this litigation in the appropriate forum. The federal courts do not, and indeed never have had, subject matter jurisdiction over Respondents' state tort claims. Rather than delay this case any further, this Court should deny the Petition and remand this case to the state court in which it properly belongs.

Respectfully submitted,

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November 9, 1998

APPENDICES

APPENDIX A

[Filed Jun. 10, 1997]

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 96-20361

**MARATHON OIL COMPANY;
MARATHON INTERNATIONAL OIL COMPANY;
MARATHON PETROLEUM NORGE A/S,
Plaintiffs-Appellants
*Cross-Appellees,***

versus

**RUHRGAS, A.G.,
Defendant-Appellee
*Cross-Appellant.***

**Appeal from the United States District Court
for the Southern District of Texas**

**Before POLITZ, Chief Judge, WIENER and STEWART,
Circuit Judges.**

POLITZ, Chief Judge:

This international commercial dispute involves allegations of fraud, civil conspiracy, and various business

torts. Concluding that the district court lacked subject matter jurisdiction, we vacate and remand with instructions.

Background

In 1976 Marathon Oil Company (MOC) became involved in North Sea gas exploration activities when its affiliate, Marathon International Oil (MIO), purchased a European concern holding a North Sea production license.¹ The production license, originally held by Marathon Petroleum Norge (Norge), ultimately gave another affiliate, Marathon Petroleum Norway (MPN) rights to 24% of a gas field in the North Sea known as the Heimdal field.² Another large interest holder in the Heimdal field was Statoil, Norway's state-owned gas company, which had purchased a 40% interest in 1975.

The present litigation arises from alleged oral and written agreements between the Marathon companies, Ruhrgas, A.G., and other European companies, regarding the development and production of Heimdal field reserves. Ruhrgas is Germany's primary gas company. According to the Marathon plaintiffs, Ruhrgas, Statoil, and a consortium of other European companies secretly conspired to monopolize the western European gas market by funneling a large portion of North Sea gas reserves through Ruhrgas's production facilities in Germany.

The plaintiffs allege that to effectuate this plan Ruhrgas duped them into providing MPN with \$300 million to participate in extensive construction and drilling operations with the false promises of premium prices for MPN's European gas sales and guaranteed pipeline transporta-

¹ MIO acquired Pan Ocean and its subsidiary, Pan Ocean Norge, which held the North Sea production license. Pan Ocean was later renamed Marathon Petroleum Norway, and Pan Ocean Norge became Marathon Petroleum Norge.

² MPN acquired the production license by virtue of a Pass Through Agreement with its subsidiary, Marathon Petroleum Norge, the original license holder.

tion tariffs to help offset the substantial construction investment.³

When it ultimately became apparent that premium prices would not be honored and the scheduled transportation tariffs would not materialize, MOC, MIO, and Norge⁴ sued Ruhrgas in Texas state court for fraud, misrepresentation, civil conspiracy, and tortious interference with business relations. Ruhrgas timely removed, invoking jurisdiction under diversity of citizenship, federal question, and 9 U.S.C. § 205. After removal, Ruhrgas moved for a stay pending arbitration in Europe which the district court denied. Ruhrgas then filed a motion to dismiss for lack of personal jurisdiction and a motion to dismiss for *forum non conveniens*. The Marathon plaintiffs moved to remand for lack of subject matter jurisdiction. The district court granted Ruhrgas's motion to dismiss for lack of personal jurisdiction and dismissed all other motions as moot. The court then denied Ruhrgas's motion for reconsideration in which Ruhrgas reurged the court to abate all proceedings pending compelled arbitration in Europe. All parties timely appealed.

Analysis

We address at the threshold the vital question of federal subject matter jurisdiction. As courts of limited jurisdiction, federal courts may adjudicate a case or controversy only if there is both constitutional and statutory

³ This proposal was known as the "Heimdal Gas Agreement," which allegedly guaranteed a \$5.50 per million BTU price. MPN, as assignee of Norge's Heimdal license, was a party to this agreement.

⁴ As a signatory to the Heimdal Gas Agreement, MPN's claims were subject to binding arbitration in Europe. Norge, however, was not a signatory and asserts that although it assigned its Heimdal license to MPN, it nonetheless has standing to sue for the alleged devaluation of the license. We address that contention *infra*.

authority for federal jurisdiction.⁵ Ruhrgas insists that we must rule on its personal jurisdiction challenge without first determining whether we have jurisdiction *ratione materiae*. We are cognizant that in some instances we have permitted the dismissal of an action for lack of personal jurisdiction without considering the question of subject matter jurisdiction.⁶

We decline, however, to extend those cases into mandatory rules of trial and appellate procedure governing the order in which jurisdictional motions must be determined. No dispositive precedent of our circuit has held that a court *must* ignore a lack of subject matter jurisdiction when it has before it an easier disposition of a motion to dismiss for lack of personal jurisdiction. Such a rule necessarily would be invalid in light of our constitutional and statutory authority and the overwhelming body of precedent commanding all federal courts to scrutinize assiduously subject matter jurisdiction at each stage of litigation, trial and appellate, and to dismiss cases not properly before us.⁷

⁵ *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); *B, Inc. v. Miller Brewing Co.*, 663 F.2d 545 (Former 5th Cir. 1981); Erwin Chemerinski, *Federal Jurisdiction* 217 (1989); see also *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850) (Congress may create lower federal courts and thus has the power to vest them with less than full Article III jurisdiction).

⁶ See, e.g., *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489 (5th Cir. 1993); *Association Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559 (5th Cir. 1993); *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964).

⁷ See, e.g., *Cutler v. Rae*, 7 U.S. (7 How.) 729 (1849); *Mansfield v. Swan*, 111 U.S. 379 (1884); *Louisville & Nashville R.R. Co. v. Motley*, 211 U.S. 149 (1908); *Mitchell v. Maurer*, 293 U.S. 237 (1934); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Philbrook v. Glodgett*, 421 U.S. 7078 (1975); *Judice v. Vail*, 430 U.S. 327 (1977); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100 (5th Cir. 1981); *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295 (5th Cir. 1985); *Mocklin v. Orleans Levee Dist.*, 877 F.2d 427 (5th Cir.

We must be ever mindful that any rule or decision allowing a federal court to act without subject matter jurisdiction conflicts irreconcilably with basic principles of federal court authority.⁸ On several occasions we have sounded the caution that "[w]here a federal court proceeds in a matter without first establishing that the dispute is within the province of controversies assigned to it by the Constitution and statute, the federal tribunal poaches upon the territory of a coordinate judicial system, and its decisions, opinions, and orders are of no effect."⁹ If dismissals for lack of personal jurisdiction were judgments on the merits, decisions allowing that determination in the absence of federal subject matter jurisdiction would have no validity.¹⁰ The appropriate course is to examine for subject matter jurisdiction constantly and, if it is found lacking, to remand to state court if appropriate, or otherwise dismiss.¹¹ Such a course respects the

1989); *Trizec Properties, Inc. v. United States Mineral Prods. Co.*, 974 F.2d 602 (5th Cir. 1992); *Moore v. United States Dept. of Agriculture ex rel. Farmers Home Admin.*, 55 F.3d 991 (5th Cir. 1995).

⁸ See, e.g., *Kokkonen*, 511 U.S. at 377 (holding that the jurisdiction of the federal courts "is not to be expanded by judicial decree") (citing *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951)).

⁹ *B, Inc.* 663 F.2d at 548; see also *Stafford v. Mobil Oil Corp.*, 945 F.2d 803 (5th Cir. 1991); *Getty Oil Co. v. Insurance Co. of N. Am.*, 841 F.2d 1254 (5th Cir. 1988); *In re Majestic Energy Corp.*, 835 F.2d 87 (5th Cir. 1988); *In re Carter*, 618 F.2d 1093 (5th Cir. 1980).

¹⁰ See *Caterpillar, Inc. v. Lewis*, 117 S.Ct. 467 (1996) (holding that a district court must have subject matter jurisdiction by the time it renders judgment for the judgment to be valid); see also *Weeks v. Fidelity & Cas. Co.*, 218 F.2d 503, 504 (5th Cir. 1955) ("If the refusal to remand was erroneous, the judgment of dismissal was likewise erroneous.") (citing *Ruff v. Gay*, 67 F.2d 684 (5th Cir. 1933), *aff'd*, 292 U.S. 25 (1934)).

¹¹ Confronted with virtually identical facts, in *Ziegler v. Champion Mortgage Co.*, 913 F.2d 220 (5th Cir. 1990), we raised the

proper balance of federalism. We must, therefore, reject Ruhrgas's invitation to ignore the formidable subject matter jurisdiction issue presented herein and resolve that fundamental issue.

Given the limited nature of federal jurisdiction, there is a strong presumption against same,¹² and "the burden of establishing the contrary rests upon the party asserting jurisdiction."¹³ Ruhrgas, as the removing party, has advanced several theories in support of federal jurisdiction. We address each in turn.

A. Diversity of Citizenship

MOC is an Ohio corporation with its principal place of business in Houston, Texas. MIO is a Delaware corporation with its principal place of business in Houston, Texas. Norge is an alien corporation headquartered in Norway. The defendant, Ruhrgas, A.G., is an alien corporation headquartered in Germany.

Norge's status as an alien corporation defeats diversity jurisdiction,¹⁴ unless, as Ruhrgas contends, Norge was fraudulently joined for that very purpose. Among other complaints,¹⁵ Norge contends that Ruhrgas's monopoliza-

subject matter jurisdiction question *sua sponte* and vacated the judgment of dismissal which was based on a lack of personal jurisdiction.

¹² *Cf. Leffal v. Dallas Indep. School Dist.*, 28 F.3d 521, 524 (5th Cir. 1994) ("Removal statutes are to be strictly construed against removal.").

¹³ *Kokkonen*, 511 U.S. at 377; see also *Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 804 (5th Cir. 1991) ("The burden of proving that complete diversity exists rests upon the party who seeks to invoke the court's diversity jurisdiction.").

¹⁴ See *Giannakos*, 762 F.2d at 1298 (holding that "[d]iversity does not exist where aliens are on both sides of the litigation").

¹⁵ At the time the parties filed their appellate briefs, Norge did not have the right to market Heimdal gas under the Pass Through

tion of the western European gas market completely prevents both MPN and itself from marketing Heimdal gas reserves to non-consortium buyers and thereby devalues the production license. Ruhrgas responds that Norge cannot complain of any damage to its production license as Norge assigned all of its interests in the Heimdal license to MPN.

The party attempting to prove fraudulent joinder has a heavy burden.¹⁶ To establish that a defendant has been joined fraudulently, "the removing party must show [by clear and convincing evidence] either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the [nondiverse] defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts."¹⁷ In making this determination, a court must resolve "all disputed questions of fact and all ambiguities in the controlling law in favor of the non-removing party."¹⁸

A close reading of the record and the extensive briefing on fraudulent joinder leave us unconvinced that Norge has been joined fraudulently to diversity jurisdiction.

Agreement. Briefing indicated that MPN's rights under the Pass Through Agreement would terminate if it failed to perform certain obligations. Norge predicted that such a reversion would occur as a result of Ruhrgas's activities during the summer of 1996. The current status of the Pass Through Agreement therefore is unclear. Terms in the agreement, however, indicate that Norge may have continuing obligations to the nation of Norway under the original production license and that Ruhrgas's interference in MPN's activities may be impacting those obligations. Norge also asserts that Ruhrgas has tortiously interfered with MPN's obligations to Norge under the Pass Through Agreement.

¹⁶ *Ford v. Elsbury*, 32 F.3d 931 (5th Cir. 1994).

¹⁷ *B, Inc.*, 663 F.2d at 549 (footnote omitted).

¹⁸ *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992); see also *Burden v. General Dynamics Corp.*, 60 F.3d 213 (5th Cir. 1995); *B, Inc.*

It is not clear what interest Norge possessed when granted the production license, nor can we determine with certainty from the record and briefings what interest *vel non* Norge retains after the Pass Through Agreement. Although Norge maintains that it holds legal title to all unproduced reserves, it is apparent that several other possibilities exist for classifying Norge's property interest. Given Texas's choice of law rules Norwegian law likely would have to be consulted to answer these difficult questions.¹⁹ At this stage in the proceedings, however, Ruhrgas shoulders the burden of proof, and it simply cannot prove, by clear and convincing evidence, that Norge has absolutely no possibility of recovering damages under any theory of liability. Diversity jurisdiction, therefore, is not present.

B. Federal Question Jurisdiction

Ruhrgas asserts that federal question jurisdiction is present because the "[p]laintiffs' claims raise substantial questions of foreign and international relations and questions of customary international law and act-of-state questions which are incorporated into and form a part of the federal common law." The Marathon plaintiffs note that they have alleged only state law causes of action and contend that the well-pleaded complaint rule bars a finding of federal question jurisdiction.

¹⁹ See *Cantu v. Bennett*, 39 Tex. 303 (1873) (indicating that the law of the situs would control the characterization of Norge's property interests); but see *Swanson v. Schlumberger Tech. Corp.* (Tex. App.—Texarkana 1995, writ granted) (indicating that Texas law may control this determination under the "most significant relationship" test). Given the fraudulent joinder standards, we must presume that Norwegian law would apply. *Burden*. There is, however, no evidence of Norwegian law in the record. Even if we were to attempt to apply Texas law, classification of these various interests and the concomitant rights of Norge to pursue damage remedies would be unclear. This alone precludes a finding of fraudulent joinder. See *Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd.*, 99 F.3d 746 (5th Cir. 1996).

In *Torres v. Southern Peru Copper Corp.*,²⁰ we found federal question jurisdiction based on the federal common law of foreign relations. As in *Torres*, the defendant's government, the Republic of Germany, has filed a letter of protest with the State Department and an amicus brief with the court. The similarities between the two cases end there. Our holding in *Torres* is a very specific application of the well-pleaded complaint rule, under which the complaint must state a cause of action necessarily requiring the "resolution of a substantial question of federal law."²¹ That test was met in *Torres* because the suit itself struck directly at vital economic interests of the nation, and, indeed, at the very sovereignty of the Republic of Peru.

The same cannot be said herein for the Republic of Germany. Its amicus brief focuses primarily on two areas: the enforceability and breadth of European arbitration clauses, and the impact on international trade from allowing suits against European companies to proceed in United States courts. Such concerns, though not insubstantial, would describe many international commercial disputes between western European corporations and United States corporations and cannot properly form the basis of federal subject matter jurisdiction.

Ruhrgas appears to be an important gas supplier in Germany and western Europe but this action does not strike at the sovereignty of a foreign nation. The plaintiffs' claims do not call into question official German policy decisions and the Republic of Germany was not a participant in the activities giving rise to this suit. This litigation does not seek to impose liability for injuries to foreign citizens occurring solely on foreign soil, as was the situation in *Torres*. Indeed, Ruhrgas allegedly came to the United States and defrauded a United States company on American soil. Merely requiring a German cor-

²⁰ 113 F.3d 540 (5th Cir. 1997).

²¹ *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983).

poration to abide by state law when present here does not necessarily implicate substantial foreign relations issues between the United States and Germany. Further, we remain unconvinced that this suit may impact severely the vital economic interests of a highly developed and flourishing industrial nation such as Germany. Federal question jurisdiction does not exist.

C. 9 U.S.C. § 205

Finally, Ruhrgas claims that this case is removable under 9 U.S.C. § 205 because the plaintiffs' claims relate to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Notably, MOC, MIO, and Norge were not signatories to any arbitration agreement, nor were they parties to any arbitration proceedings.²²

Under 9 U.S.C. § 205, federal jurisdiction exists if the plaintiffs' claims relate to an arbitration agreement or award falling under the Convention on the Recognition of Foreign Arbitral Awards. An arbitration agreement or award falling under the Convention is one which arises out of an international commercial legal relationship.²³ No one disputes that the plaintiffs' claims arise from international commercial relationships; the issue is whether any *relevant* arbitration agreement exists between the parties to this litigation, a necessary predicate for federal jurisdiction under 9 U.S.C. § 205.²⁴ Simply stated, there

²² MPN, however, has participated successfully in arbitration proceedings in Europe.

²³ See 9 U.S.C. §§ 205, 2.

²⁴ See *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Corp.*, 767 F.2d 1140 (5th Cir. 1995) (holding that the Convention only applies where (1) there is an agreement in writing to arbitrate the dispute; (2) the agreement provides for arbitration in the territory of a Convention signatory; (3) the agreement to arbitrate arises from a commercial legal relationship; and (4) a Non-American citizen is a party to the agreement).

is no such agreement.²⁵

Ruhrgas maintains that the Marathon plaintiffs are attempting to enforce provisions of the Heimdal Gas Agreement, an agreement to which they are not parties. It further characterizes this suit as an inappropriate attempt to circumvent the arbitration agreement under which MPN is bound to arbitrate any disputes concerning the Heimdal Gas Agreement. As such, Ruhrgas contends that the Marathon plaintiffs should be estopped from denying the applicability of the arbitration provisions. We are not persuaded.

MOC and MIO are not seeking redress for wrongs done to MPN. Rather, they allege that Ruhrgas and others jointly participated in a scheme to induce them fraudulently into investing \$300 million into MPN. That Ruhrgas may have effectuated this fraud through its contractual relationship with MPN does not lead to the conclusion that MOC and MIO are seeking damages for harm done to MPN. Further, MOC and MIO are not seeking damages for any breach of contract; they could not do so because no contracts exist between them and Ruhrgas.²⁶ The same is true of Norge's claims. Norge merely claims that Ruhrgas's tortious conduct has affected the value of its production license and impeded its obligations and rights under the Heimdal license and Pass Through Agreement. Norge is not seeking damages on behalf of MPN, nor has it claimed entitlement to any rights under the Heimdal Gas Agreement.

²⁵ Ruhrgas acknowledges that none of the Marathon plaintiffs have any contractual relationship with Ruhrgas and that none of the plaintiffs ever signed an arbitration agreement.

²⁶ Contrary to Ruhrgas's contention that the Marathon plaintiffs are seeking to enforce the pricing arrangements in the Heimdal Gas Agreement, plaintiffs do not seek injunctive relief. Moreover, the plaintiffs would not be entitled to recover the lost profits of MPN, though such figures may be relative in proving the extent of the plaintiffs' damages.

12a

Finally, Ruhrgas asserts other theories for its thesis that the arbitration provisions in the Heimdal Gas Agreement should apply to all of MPN's corporate affiliates. None is persuasive.

Conclusion

Concluding that the district court lacked subject matter jurisdiction, we vacate the judgment of the district court and remand with instructions that this action be remanded to the 152nd Judicial District Court of Harris County, Texas.

VACATED and REMANDED.

13a

APPENDIX B

SUPREME COURT OF THE UNITED STATES

Office of the Clerk
Washington, D.C. 20543

November 10, 1997

No. 97-409

RUHRGAS, A. G.

v.

MARATHON OIL COMPANY, *et al.*

Dear Mr. Hutchinson:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
WILLIAM K. SUTER
Clerk

(3)

No. 98-470

FILED

NOV 19 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

October Term, 1998

RUHRGAS AG,

Petitioner,

v.

MARATHON OIL COMPANY, MARATHON
INTERNATIONAL OIL COMPANY, and
MARATHON PETROLEUM NORGE A/S,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Ruhrgas AG ("Ruhrgas") respectfully submits this Reply to the Brief in Opposition of Marathon Oil Company, Marathon International Oil Company, and Marathon Petroleum Norge A/S ("Respondents").

The question presented by this Petition is whether district courts are absolutely barred in all circumstances from dismissing a removed case for lack of personal jurisdiction without first deciding subject-matter jurisdiction.¹ In this case, the Fifth Circuit answered this question in the affirmative. *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 216, 217-20 (5th Cir. 1998); Pet. App. at A9-A20.² In *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155 (2d Cir. 1996), the Second Circuit answered the same question in the negative. The federal district courts are caught in the

¹ The Fifth Circuit held that a district court must decide subject-matter jurisdiction before personal jurisdiction in every removed case, regardless of the facts, circumstances, or issues presented in a particular case. The issue presented by this Petition is whether such mandatory sequencing of jurisdictional decisions is required by federal law. Because the relative strength or weakness of the parties' positions on the personal jurisdiction and subject-matter jurisdiction issues or the relative complexity of these issues is irrelevant under the Fifth Circuit rule, it is unclear why Respondents set forth facts and arguments pertinent to the personal jurisdiction and subject-matter jurisdiction issues in their Brief in Opposition. See, e.g., Brief in Opp. at 2-4, 15 n.5. Nevertheless, the record in this case demonstrates that Respondents' Statement of Facts and their arguments based thereon are both wrong and misleading.

² In so holding, the *en banc* Fifth Circuit overruled prior Fifth Circuit authority which had answered the question in the negative. 145 F.3d at 221-22; Pet. App. at A20-A22.

middle, inasmuch as the choice between the Fifth Circuit's mandatory rule and the Second Circuit's discretionary rule has a real, practical effect on the district courts' management of their dockets. See *Steel Co. v. Citizens for a Better Environment*, ___ U.S. ___, 118 S. Ct. 1003, 1021 (1998) (Breyer, J. concurring) ("to insist upon a 'rigid order of operations' in today's world of federal court caseloads that have grown enormously over a generation means unnecessary delay and consequent added cost").³

In their Brief in Opposition, Respondents concede that "federal courts have jurisdiction to determine jurisdiction." Brief in Opp. at 7. Nevertheless, Respondents contend that "jurisdiction" in this context does not include personal jurisdiction. In making this argument, Respondents ignore this Court's decision in *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 382 (1937), in which this Court held that personal jurisdiction "is an essential element of the jurisdiction of a district . . . court as a federal court, and that in the absence of this element, the court is powerless to proceed to an adjudication."

³ Respondents contend that the mandatory rule is necessary to avoid delay in removed cases, and they point to this case as an example in point. Contrary to Respondents' contentions, the discretionary rule adopted by the Second Circuit enables the district courts to consider the most efficient manner of managing a removed case to minimize delay and expense. The mandatory rule adopted by the Fifth Circuit does not. Additionally, Respondents' allegation that Ruhrgas has delayed improperly the resolution of this dispute is baseless. Respondents elected to initiate this litigation in an improper forum. The resulting forum battle is of Respondents' own making.

(emphasis added)⁴ Similarly, Respondents' discussion of *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) conspicuously ignores this Court's statement in that case that "the validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties." 456 U.S. at 701 (emphasis added). Both subject-matter jurisdiction and personal jurisdiction are derived from the Constitution,⁵ and both are essential elements of a federal court's power to proceed to an adjudication. Nothing in this Court's prior decisions supports the Fifth Circuit's conclusion that a district court must always consider the subject-matter element of its jurisdiction before determining personal jurisdiction, in exercising its inherent jurisdiction to determine jurisdiction.⁶

⁴ Although *Employers Reinsurance Corp. v. Bryant* is a case relied on prominently in the Petition (see Pet. at 8, 10), that case is never mentioned in the Brief in Opposition.

⁵ Respondents assert in their Brief in Opposition at 7 that the district court's dismissal order was "based on a state law question of amenability to process. . . ." In fact, the dismissal was based exclusively on the district court's determination that the exercise of jurisdiction would violate the Due Process Clause.

⁶ Nor does 5A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1350 (1990) support the Fifth Circuit's conclusion. The cases cited in support of the statement from section 1350 quoted by Respondents held that a court must decide a challenge to subject-matter jurisdiction before ruling on the merits or on a Rule 12(b)(6) motion. In alleging that the Petition in this case represents "an abrupt about-face" by Professors Wright and Miller, and that "[b]efore appearing here, their statements regarding the threshold nature of subject matter jurisdiction were unequivocal," Respondents apparently

Leroy v. Great W. United Corp., 443 U.S. 173 (1979), cited by Respondents, provides no such support. This Court noted in *Leroy* that personal jurisdiction and venue are not fundamentally preliminary in the sense that subject-matter jurisdiction is, given a defendant's ability to waive personal jurisdiction or venue arguments. *Leroy* addressed only the question whether personal jurisdiction always must be decided before venue. Nothing in *Leroy* questions this Court's prior decision in *Employers Reinsurance*, which established that personal jurisdiction is an essential element of the district court's jurisdiction without which the Court is powerless to proceed to an adjudication. Three years after *Leroy* was decided, this Court reaffirmed that principle in *Insurance Corp. of Ireland*, 456 U.S. at 701. *Leroy* neither presented nor decided the question whether subject-matter jurisdiction must be determined before personal jurisdiction in every case.⁷

overlooked what is said in 14C WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3d § 3739, at 462 (1998):

A number of federal courts, including some courts of appeals, have held that even if the federal district court lacks subject matter jurisdiction over a removed action, it may entertain a motion by the defendant to dismiss for lack of personal jurisdiction or various other related threshold matters before passing on the motion to remand.

⁷ Nor did *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368 (11th Cir. 1998), also relied on by Respondents, present or decide that question. *Pacheco de Perez* held that a district court must determine subject-matter jurisdiction before considering a *forum non conveniens* motion. It is completely settled that *forum non conveniens* does not come into play unless the court in which the

Respondents' reliance on *Steel Co. v. Citizens for a Better Environment*, likewise is misplaced. In *Steel Co.*, this Court repudiated the practice of "'assuming' [subject-matter jurisdiction] for the purpose of deciding the merits." 118 S. Ct. at 1012 (emphasis added). *Steel Co.* is inapplicable because the district court did not assume the existence of subject-matter jurisdiction,⁸ and the district court did not decide "the merits."

In an effort to stretch *Steel Co.* to cover this case, Respondents argue that the district court's decision on the personal-jurisdiction question was "a merits-based ruling." Brief in Opp. at 10. However, a dismissal for lack of personal jurisdiction does not operate as an adjudication on the merits. *Kendall v. Overseas Development Corp.*, 700 F.2d 536, 539 (9th Cir. 1983); *Compagnie des Bauxites de Guinee v. L'Union Atlantique S.A. D'Assurances*, 723 F.2d 357, 360 (3d Cir. 1983); cf. *Costello v. United States*, 365 U.S. 265, 284-86 (1960) (dismissal order in question was a

action was brought has both subject-matter and personal jurisdiction. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947). Both subject-matter jurisdiction and personal jurisdiction raise constitutional issues going to the court's power to adjudicate the case; *forum non conveniens* raises no constitutional issue, nor does it affect the court's power to adjudicate the case.

⁸ Respondents' assertion that the district court in this case "assum[ed] that the court hypothetically had the power to retain the case . . ." (Brief in Opp. at 14) is wrong. The district court applied prior Fifth Circuit authority holding that district courts have discretion to reach personal jurisdiction first in a removed case without deciding the question whether subject-matter jurisdiction exists. Pet. App. at B10. The district court never decided the subject-matter jurisdiction issues raised by the motion to remand.

dismissal for lack of jurisdiction that did not operate as an adjudication on the merits). Rule 41(b) of the Federal Rules of Civil Procedure expressly provides that a dismissal for lack of jurisdiction does not operate as an adjudication on the merits. FED. R. CIV. P. 41(b). Because the district court's dismissal of this case was a dismissal for lack of jurisdiction, it does not operate as an adjudication on the merits, and *Steel Co.* is inapplicable.

Respondents argue that there is "no conflict with the Second Circuit." Yet, Respondents do not and cannot contend that the Fifth Circuit's decision does not conflict with the Second Circuit's decision in *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d at 155, which expressly upheld the district court's dismissal of a removed case for lack of personal jurisdiction without reaching the subject-matter jurisdiction issue raised by the plaintiff's motion to remand. Respondents merely assert that *Cantor Fitzgerald* is a nullity because it purportedly is inconsistent with the Second Circuit's prior decision in *Rhulen Agency, Inc. v. Alabama Insurance Guaranty Ass'n*, 896 F.2d 674 (2nd Cir. 1990).⁹ *Rhulen* was not a removal case, but was a case originally filed in federal court. The Second Circuit in *Rhulen* held that the district court should have taken up the motion to dismiss under Rule 12(b)(1) because a dismissal for lack of subject-matter jurisdiction would

⁹ Respondents also assert that *Cantor Fitzgerald* was "invalidated" by this Court's decision in *Steel Co.*, 118 S. Ct. at 1012. Brief in Opp. at 16. As shown *supra* at 5-6, *Steel Co.* rejected the hypothetical assumption of jurisdiction to decide the merits. It does not address the question of which of two jurisdictional issues must be resolved first.

have rendered moot the personal-jurisdiction issue.¹⁰ In *Cantor Fitzgerald*, the Second Circuit cited *Rhulen* for the proposition that a district court may not first decide a challenge to personal jurisdiction *unless* the personal jurisdiction question is easier to resolve than the subject-matter jurisdiction question. *Cantor Fitzgerald*, 88 F.3d at 155. Judge Newman was a member of the panels in both *Rhulen* and *Cantor Fitzgerald*. *Cantor Fitzgerald* represents the law of the Second Circuit on the question whether a district court may take up personal jurisdiction before subject-matter jurisdiction in a removed case.¹¹

¹⁰ Of course, in a removal context, the granting of a motion to remand does not render the personal-jurisdiction issue moot; it still must be determined by the state court on remand.

¹¹ In footnote 4 of their Brief in Opposition, Respondents cite six recent district court cases in the Second Circuit which have followed the *Rhulen* rule: *United States v. Carpentieri*, No. 96-Civ.-6460, 1998 WL 749042, at *2 (S.D.N.Y. October 26, 1998); *Seemann v. Maxwell*, 178 F.R.D. 23, 25 n.1 (N.D.N.Y. 1998); *Madanes v. Madanes*, 981 F. Supp. 241, 249 (S.D.N.Y. 1997); *Integrated Utils., Inc. v. United States*, No. 96-Civ.-8983, 1997 WL 529007, at *2 (S.D.N.Y. August 26, 1997); *Sanger v. Reno*, 966 F. Supp. 151, 159 (E.D.N.Y. 1997); *Sanchez-Preston v. Luria*, No. CV-96-2440, 1996 WL 738140, at *2 (E.D.N.Y. Dec. 17, 1996). None of those cases were cases removed to federal court from state court; all were filed originally in federal court. Only two of the six cases, *Madanes* and *Seemann*, involved motions to dismiss under both Rule 12(b)(1) and Rule 12(b)(2). In both *Madanes* and *Seemann*, there was no basis for contending that judicial economy would be served by first addressing the question of personal jurisdiction. In *Seemann*, the absence of complete diversity appeared on the face of the complaint and there was no allegation of fraudulent joinder. 178 F.R.D. at 24-25. In *Madanes*, only two of ten defendants moved to dismiss for lack of personal jurisdiction, and the court therefore was required to address the subject-matter jurisdiction issue regardless of the

The mandatory rule adopted by the Fifth Circuit in this case is in direct conflict with the discretionary rule approved by the Second Circuit in *Cantor Fitzgerald*. Given the importance of the question to the federal district courts in the management of their dockets and the direct conflict between the Second and Fifth Circuits on the question, certiorari review is warranted.

disposition of the personal-jurisdiction question. 981 F. Supp. at 260. Respondents fail to mention *Aerogroup Intern., Inc. v. Marlboro Footworks Ltd.*, 956 F. Supp. 427, 429 n.3 (S.D.N.Y. 1996), in which the district court held that *Cantor Fitzgerald* permitted dismissal of the case for lack of personal jurisdiction notwithstanding an unresolved challenge to subject-matter jurisdiction because the question of subject-matter jurisdiction was "not easily resolved" and personal jurisdiction was a "simpler ground" for disposing of the case.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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In The
Supreme Court of the United States

October Term, 1998

RUHRGAS AG,

v.

Petitioner,

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
and MARATHON PETROLEUM NORGE A/S,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

JOINT APPENDIX
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Petition For Certiorari Filed September 18, 1998
Certiorari Granted December 7, 1998

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RELEVANT DOCKET ENTRIES

U.S. District Court
 TXS - Southern District of Texas (Houston)

CIVIL DOCKET FOR CASE #: 95-CV-4176

8/21/95	1	NOTICE OF REMOVAL; filed FILING FEE \$ 120.00 RECEIPT # 450373 (ph) [Entry date 08/24/95]
		* * *
8/28/95	4	MOTION to dismiss under Fed.R.Civ.P. 12(b)(2), (4) and (5) by Ruhrgas A G, Motion Docket Date 9/17/95 [4-1] motion, filed. (fs) [Entry date 08/29/95]
8/28/95	5	MEMORANDUM by Ruhrgas A G in support of [4-1] motion to dismiss under Fed.R.Civ.P. 12(b)(2), (4) and (5), filed (fs) [Entry date 08/29/95]
8/28/95	6	MOTION for stay pending arbi- tration by Ruhrgas A G, Motion Docket Date 9/17/95 [6-1] motion, filed. (fs) [Entry date 08/29/95]
8/28/95	7	MEMORANDUM by Ruhrgas A G in support of [6-1] motion for stay pending arbitration, filed (fs) [Entry date 08/29/95]
8/28/95	8	MOTION to dismiss on forum non conveniens grounds by Ruhrgas A-G, Motion Docket Date 9/17/95 [8-1] motion, filed. (fs) [Entry date 08/29/95]

8/28/95	9	MEMORANDUM by Ruhrgas A G in support of [8-1] motion to dismiss on forum non conveniens grounds, filed (fs) [Entry date 08/29/95]
		* * *
9/15/95	12	MOTION to remand by Pltfs Marathon Oil Company, Marathon Intl Oil Co, and Marathon Petro Norge, Motion Docket Date 10/5/95 [12-1] motion, filed w/exhibits (bh) [Entry date 09/18/95]
9/15/95	13	BRIEF in support of their [12-1] motion to remand by Pltfs Marathon Oil Co. Marathon International Oil Co, and Marathon Petroleum Norge A/S, filed (bh) [Entry date 09/18/95]
9/15/95	14	Pltf's MOTION to stay pending resolution of their motion to remand by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge, Motion Docket Date 10/5/95 [14-1] motion, filed. (ej) [Entry date 09/18/95]
9/18/95	15	Pltf's RESPONSE by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge to Deft's [8-1] motion to dismiss for insufficiency of process, on forum non conveniens grounds, or to quash service, filed. (ej) [Entry date 09/20/95]

		* * *
9/18/95	17	Pltf's STIPULATION re: time to respond to outstanding motions, by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge, filed. (ej) [Entry date 09/20/95]
9/18/95	18	Pltf's RESPONSE by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge to Deft's [6-1] motion for stay pending arbitration, filed. (ej) [Entry date 09/21/95]
9/22/95	19	ORDER approving [17-1] stipulation as to response due date to pltfs' motion to remand, extended to 12/1/95, entered; Parties notified. (signed by Judge Melinda Harmon) (fs) [Entry date 09/25/95]
		* * *
10/4/95	22	MOTION for order staying merits discovery, deferring Rule 26(f) meeting and Rule 26(a) Initial Disclosures, and authorizing limited discovery on subject matter jurisdiction and personal jurisdiction issues by Ruhrgas A G, Motion Docket Date 10/24/95 [22-1] motion, 10/24/95 [22-2] motion, 10/24/95 [22-3] motion, filed. (fs) [Entry date 10/05/95]
10/5/95	23	RESPONSE by Ruhrgas A G to pltfs' [14-1] motion to stay

pending resolution of their motion to remand, filed. (fs) [Entry date 10/10/95]

10/12/95 24 REPLY by Ruhrgas A G to pltfs' response to [6-1] motion for stay pending arbitration, filed (fs) [Entry date 10/16/95]

10/12/95 25 REPLY by Ruhrgas A G to pltfs' response to [4-1] motion to dismiss under Fed.R.Civ.P. 12(b)(2), (4) and (5), filed (fs) [Entry date 10/16/95]

* * *

10/20/95 27 STIPULATION re: Rule 26(a) Initial Disclosures by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge, Ruhrgas A G, filed. (ej) [Entry date 10/24/95]

* * *

10/25/95 30 RESPONSE by Marathon Oil Company, Marathon Intl Oil Co. Marathon Petro Norge to deft's [22-1] motion for order staying merits discovery, [22-2] motion deferring Rule 26(f) and Rule 26(a) Initial Disclosures, [22-3] motion authorizing limited discovery on subject matter jurisdiction and personal jurisdiction issues, filed. (fs) [Entry date 10/26/95]

* * *

11/2/95 32 REPLY by Ruhrgas A G to pltfs' response to deft's [22-1] motion for order staying merits discovery, [22-2] motion deferring Rule meeting and Rule 26(a) Initial Disclosures, [22-3] motion authorizing limited discovery on subject matter and personal jurisdiction issues, filed (fs) [Entry date 11/03/95]

11/6/95 33 MEMORANDUM AND ORDER: On 11/6/95 a Rule 16 Conference and Motion hearing were conducted. A Scheduling Order was entered and upon the agreement of the parties deft's response to motion to remand is due 12/1/95; Response to motion reset to 12/1/95 for [12-1] motion to remand, entered. Parties notified. (signed by Magistrate Judge Frances H. Stacy) (fs) [Entry date 11/15/95]

* * *

11/15/95 36 MEMORANDUM AND ORDER denying [4-1] motion to dismiss under Fed.R.Civ.P. 12(b)(2), (4) and (5) granting [10-1] motion to seal gas sales agreement granting in part, denying in part [22-1] motion for order staying merits discovery granting [22-2] motion deferring Rule 26(f) meeting and Rule 26(a) Initial Disclosures granting in part, denying in part [22-3] motion

authorizing limited discovery on subject matter jurisdiction and personal jurisdiction issues granting in part, denying in part [14-1] motion to stay pending resolution of their motion to remand, entered. Parties notified. (signed by Judge Melinda Harmon) (fs) [Entry date 11/16/95]

* * *

- 11/15/95 38 MEMORANDUM AND ORDER denying Ruhrgas's [6-1] motion for stay pending arbitration, entered. Parties notified. (signed by Melinda Harmon) (ph) [Entry date 11/17/95]
- 11/21/95 39 MOTION for reconsideration of [38-1] order denying motion for stay pending arbitration, or in the alternative to vacate and defer ruling pending discovery by Ruhrgas A G, Motion Docket Date 12/11/95 [39-1] motion, 12/11/95 [39-2] motion, filed. (large pleading, in brown expandex folder) (fs) [Entry date 11/27/95] [Edit date 11/27/95]
- * * *
- 12/4/95 42 RESPONSE by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge to deft Ruhrgas' [39-1] motion for reconsideration of [38-1] order

denying motion for stay pending arbitration, filed. (fs) [Entry date 12/07/95]

* * *

- 12/22/95 47 REPLY by Ruhrgas A G to pltfs' response to Ruhrgas' [39-1] motion for reconsideration of [38-1] order denying motion for stay pending arbitration, filed (fs) [Entry date 01/02/96]

* * *

- 1/4/96 51 MOTION to extend deadlines by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge, Docket Date 1/24/96 [51-1] motion, filed. (fs) [Entry date 01/05/96]
- 1/9/96 53 Pltfs' SURREPLY BRIEF regarding deft's [39-1] motion for reconsideration of [38-1] order denying motion for stay pending arbitration, filed (fs) [Entry date 01/12/96]
- 1/9/96 54 AMENDED MOTION to extend deadlines by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge, Motion Docket Date 1/29/96 [54-1] motion, filed. (fs) [Entry date 01/12/96]
- 1/9/96 55 RESPONSE by Ruhrgas A G to pltfs' [54-1] amended motion to extend deadlines, filed. (bj) [Entry date 01/16/96]

- 1/11/96 52 ORDER granting pltfs' [51-1] amended motion to extend deadlines; discovery on all personal jurisdiction and related issues must be completed by 1/26/96; Motion Docket Date 2/8/96 [4-1] motion to dismiss for lack of personal jurisdiction, 2/8/96 [8-1] motion to dismiss on forum non conveniens grounds, 2/8/96 [12-1] motion to remand, entered; Parties notified. (signed by Judge Melinda Harmon) (fs) [Entry date 01/12/96]
- 1/11/96 56 REPLY BRIEF by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge in support of [54-1] motion to extend deadlines, filed. (fs) [Entry date 01/17/96]
- 1/12/96 57 SUPPLEMENT to [8-1] motion to dismiss on forum non conveniens grounds by Ruhrgas A G, filed. (fs) [Entry date 01/17/96]
- 1/16/96 58 MOTION for leave to file brief for the Federal Republic of Germany as Amicus Curiae in support of Ruhrgas with memorandum of points and authorities, by Federal Rep. Germany, Motion Docket Date 2/5/96 [58-1] motion, filed.

- 1/23/96 59 RESPONSE by Ruhrgas A G to pltf's surreply brief regarding deft's [39-1] motion for reconsideration of [38-1] order denying motion for stay pending arbitration, filed (fs) [Entry date 01/25/96]
- 1/24/96 60 ORDER granting [58-1] motion for leave to file brief for the Federal Republic of Germany as Amicus Curiae in support of Ruhrgas, entered; Parties notified. Pltfs shall have until 2/8/96 to file any response to the amicus brief. (signed by Judge Melinda Harmon) (ph) [Entry date 01/26/96]
- 2/8/96 61 RESPONSE by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge to [58-1] motion for leave to file brief for the Federal Republic of Germany as Amicus Curiae in support of Ruhrgas, filed. (fs) [Entry date 02/09/96]
- 2/8/96 62 RESPONSE by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge to Ruhrgas' [9-1] memorandum in support of motion to dismiss on forum non conveniens grounds, filed. (fs) [Entry date 02/09/96]

- 2/8/96 63 RESPONSE by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge to Ruhrgas' motion to dismiss for lack of personal jurisdiction, filed. (w/2 brown expandex folders containing exhibits, vols 1, 2, 3, 4 & 5) (fs) [Entry date 02/09/96]
- 2/8/96 64 RESPONSE by Ruhrgas A G to [12-1] motion to remand, filed. (w/2 brown expandex folders containing exhibits, vols 1 and 2) (fs) [Entry date 02/09/96]
- 2/16/96 65 REPLY by Ruhrgas A G to response to [4-1] motion to dismiss under Fed.R.Civ.P. 12(b)(2), (4) and (5), (w/2 volumes of exhibits in brown expandex folder), filed (fs) [Entry date 02/21/96] [Edit date 02/21/96]
- 2/16/96 66 REPLY by Ruhrgas A G to pltfs' response to [8-1] motion to dismiss on forum non conveniens grounds, filed (fs) [Entry date 02/21/96]
- 2/22/96 67 REPLY BRIEF by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge in support of [12-1] motion to remand, filed. (This instrument is in brown expandex folder) (fs) [Entry date 02/26/96]

- 3/1/96 68 SURREPLY to [67-1] brief by Ruhrgas A G, filed. (mis) [Entry date 03/06/96]
- 3/5/96 69 SURREPLY to [4-1] motion to dismiss (for lack of personal jurisdiction) under Fed.R.Civ.P. 12(b)(2), (4) and (5) by Marathon Oil Company, Marathon Intl Oil Co. Marathon Petro Norge, filed. (fs) [Entry date 03/07/96]
- 3/8/96 70 Deft's RESPONSE by Ruhrgas A G to Pltf's Surreply to motion [69-1] to dismiss for lack of personal jurisdiction, filed. (ej) [Entry date 03/12/96]
- 3/20/96 71 RESPONSE by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge to surreply to [12-1] motion to remand, filed. (fs) [Entry date 03/21/96]
- 3/26/96 72 SUPPLEMENT to Ruhrgas' [39-1] motion for reconsideration of [38-1] order denying motion for stay pending arbitration, and to its [64-1] response to pltfs' motion to remand, by Ruhrgas A G, filed. (fs)
- 3/29/96 73 MEMORANDUM AND ORDER denying [39-1] motion for reconsideration of [38-1] order denying motion for stay pending arbitration denying [39-2] motion to vacate and defer ruling pending discovery granting

[4-1] motion to dismiss under Fed.R.Civ.P. 12(b)(2), (4) and (5) denying [12-1] motion to remand denying [8-1] motion to dismiss on forum non conveniens grounds, entered. Parties notified. (signed by Judge Melinda Harmon) (fs)

3/29/96

74

ORDER OF DISMISSAL: in accordance with the Court's Memorandum and Order of this day granting deft Ruhrgas' motion to dismiss for lack of personal jurisdiction, the Court ORDERS this case be DISMISSED for lack of personal jurisdiction over deft Ruhrgas, and that Ruhrgas shall recover its costs of court., entered; Parties notified. (signed by Judge Melinda Harmon) (fs)

* * *

4/4/96

76

NOTICE OF APPEAL of [74-1] order, [73-1] order by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge, filed. Fee Status: paid Receipt #: 455725 (bpw) [Entry date 04/09/96]

* * *

4/17/96

78

NOTICE OF APPEAL of [74-1] order, [38-1] order by Ruhrgas A G, filed. Fee Status: paid Receipt #: 456028 (bpw) [Entry date 04/19/96]

GENERAL DOCKET FOR
Fifth Circuit Court of Appeals

* * *

4/30/96

Record on appeal filed. Volumes: 7 Exhibits: 2 Boxes - [96-20361, 96-20405] ROA ddl satisfied. [96-20361 96-20405]

* * *

6/13/96

Appellant's Brief filed by Appellant-Cross-Appellee Marathon Oil Comp in 96-20361, Appellant-Cross-Appellee Marathon Intl Oil Co in 96-20361, Appellant-Cross-Appellee Marathon Petro Norge in 96-20361, Appellant-Cross-Appellee Marathon Oil Comp in 96-20405, Appellant-Cross-Appellee Marathon Intl Oil Co in 96-20405, Appellant-Cross-Appellee Marathon Petro Norge in 96-20405. Copies of brief: 7 # of pages: 40. Date of COS: 6/10/96 Sufficient [Y/N]: y, [96-20361, 96-20405] A/Pet's Brief ddl satisfied, XA/Pet Brief due on 7/15/96 for A G Ruhrgas in 96-20361, for A G Ruhrgas in 96-20405. [96-20361 96-20405]

* * *

7/10/96

Cross Appellant's Brief filed by Appellee-Cross-Appellant A G Ruhrgas in 96-20361, Appellee-Cross-Appellant A G Ruhrgas in 96-20405. Copies of Brief: 7 # of pages: 40 Date of COS: 7/10/96 Sufficient [Y/N]: Y [96-20361, 96-20405] XA/Pet Brief ddl satisfied. XE/Res Brief due on 8/9/96 for Marathon Petro Norge in 96-20361, for Marathon Intl Oil Co in 96-20361, for Marathon Oil Comp in 96-20361, for Marathon Petro Norge in 96-20405, for Marathon Intl Oil Co in 96-20405, for Marathon Oil Comp in 96-20405. [96-20361 96-20405]

- * * *
- 7/22/96 Motion filed by Federal Republic of Germany to file amicus brief [364201-1] Response/Opposition due on 7/30/96 in 96-20361, in 96-20405. [96-20361, 96-20405] [96-20361 96-20405]
- 7/31/96 Response/opposition filed by Appellant-Cross-Appellee Marathon Oil Comp in 96-20361, Appellant-Cross-Appellee Marathon Intl Oil Co in 96-20361, Appellant-Cross-Appellee Marathon Petro Norge in 96-20361, Appellant-Cross-Appellee Marathon Oil Comp in 96-20405, Appellant-Cross-Appellee Marathon Intl Oil Co in 96-20405, Appellant-Cross-Appellee Marathon Petro Norge in 96-20405 to motion to file amicus brief [364201-1] Response/Opposition ddl satisfied. in 96-20361, motion to file amicus brief [364201-1] in 96-20405 [371835-1] [96-20361, 96-20405] [96-20361 96-20405]
- 8/2/96 COURT Order filed granting motion to file amicus brief [364201-1] in 96-20361, 96-20405 (JMD) Copies to all counsel. [96-20361, 96-20405] [96-20361 96-20405]
- 8/2/96 Amicus curiae brief filed by Amicus Curiae Fed Repub of Germany in 96-20361, Amicus Curiae Fed Repub of Germany in 96-20405. Copies of Brief: 8 # of pages: 10. Date of COS: 7/19/96 Sufficient [Y/N]: y. . [96-20361, 96-20405] XE/Res Brief ddl updated to 9/3/96 for Marathon Petro Norge in 96-20361, for Marathon Intl Oil Co in 96-20361, for Marathon Oil Comp in 96-20361, for Marathon Petro Norge in 96-20405, for Marathon Intl Oil Co in 96-20405, for Marathon Oil Comp in 96-20405. [96-20361 96-20405]

- 9/6/96 Cross Appellee's Brief filed by Appellant-Cross-Appellee Marathon Oil Comp in 96-20361, Appellant-Cross-Appellee Marathon Intl Oil Co in 96-20361, Appellant-Cross-Appellee Marathon Petro Norge in 96-20361, Appellant-Cross-Appellee Marathon Oil Comp in 96-20405, Appellant-Cross-Appellee Marathon Intl Oil Co in 96-20405, Appellant-Cross-Appellee Marathon Petro Norge in 96-20405. Copies of Brief: 7 # of pages: 38. Date of COS: 9/3/96 Sufficient [Y/N]: y. [96-20361, 96-20405] XE/Res brief ddl satisfied. XA/Pet Reply Brief due on 9/20/96 for A G Ruhrgas in 96-20361, for A G Ruhrgas in 96-20405. [96-20361 96-20405]
- * * *
- 9/19/96 Cross Appellant's Reply Brief filed by Appellee-Cross-Appellant A G Ruhrgas in 96-20361, Appellee-Cross-Appellant A G Ruhrgas in 96-20405. Copies of Brief: 7 # of pages: 15 Date of COS: 9/18/96. Sufficient [Y/N]: y. [96-20361, 96-20405] XA/Pet Reply Brief ddl satisfied. [96-20361 96-20405]
- * * *
- 12/4/96 Oral argument heard. Case argued by Clifton T Hutchinson for Appellant-Cross-Appellee Marathon Petro Norge, Appellant-Cross-Appellee Marathon Intl Oil Co, Appellant-Cross-Appellee Marathon Oil Comp in 96-20361, David John Schenck for Appellant-Cross-Appellee Marathon Petro Norge, Appellant-Cross-Appellee Marathon Intl Oil Co, Appellant-Cross-Appellee Marathon Oil Comp in 96-20361, Ben H Sheppard for Appellee-Cross-Appellant A G Ruhrgas in

96-20361, Guy Stanford Lipe for Appellee-Cross-Appellant A G Ruhrgas in 96-20361, J Gregory Taylor for Appellant-Cross-Appellee Marathon Petro Norge, Appellant-Cross-Appellee Marathon Intl Oil Co, Appellant-Cross-Appellee Marathon Oil Comp in 96-20405, David John Schenck for Appellant-Cross-Appellee Marathon Petro Norge, Appellant-Cross-Appellee Marathon Intl Oil Co, Appellant-Cross-Appellee Marathon Oil Comp in 96-20405, Ben H Sheppard for Appellee-Cross-Appellant A G Ruhrgas in 96-20405, Guy Stanford Lipe for Appellee-Cross-Appellant A G Ruhrgas in 96-20405 [96-20361, 96-20405] [96-20361 96-20405]

* * *

6/10/97 Opinion filed. Issd in T form? y Issue Mandate due on 7/1/97 in 96-20361, in 96-20405. [96-20361, 96-20405] [96-20361 96-20405]

6/10/97 Judgment entered and filed. [96-20361, 96-20405] [96-20361 96-20405]

* * *

11/17/97 COURT Order filed for rehearing en banc, on the court's own motion, [789770-1] with Argument (Y/N)? y Before: All Active Judges A/Pet Supplemental Brief due on 12/18/97 for Marathon Oil Comp in 96-20361, for Marathon Intl Oil Co in 96-20361, for Marathon Petro Norge in 96-20361, for Marathon Oil Comp in 96-20405, for Marathon Intl Oil Co in 96-20405, for Marathon Petro Norge in 96-20405. E/Res Supplemental Brief due on 1/20/98 for A G Ruhrgas in 96-20361, for

A G Ruhrgas in 96-20405. () Copies to all counsel. [96-20361, 96-20405] [96-20361 96-20405]

* * *

12/22/97 Supplemental brief filed by Appellant-Cross-Appellee Marathon Petro Norge in 96-20361, Appellant-Cross-Appellee Marathon Intl Oil Co in 96-20361, Appellant-Cross-Appellee Marathon Oil Comp in 96-20361, Appellant-Cross-Appellee Marathon Petro Norge in 96-20405, Appellant-Cross-Appellee Marathon Intl Oil Co in 96-20405, Appellant-Cross-Appellee Marathon Oil Comp in 96-20405. Copies of Brief: 20 # of pages: 35. Date of COS: 12/18/97 [96-20361, 96-20405] A/Pet Supplemental Brief ddl satisfied. [96-20361 96-20405]

* * *

1/20/98 Supplemental brief filed by Appellee-Cross-Appellant A G Ruhrgas in 96-20361, Appellee-Cross-Appellant A G Ruhrgas in 96-20405 Copies of Brief: 20 # of pages: 39. Date of COS: 1/20/98 [96-20361, 96-20405] E/Res Supplemental Brief ddl satisfied. [96-20361 96-20405]

* * *

2/4/98 Motion filed by Certain Insurer Defendants in Louisiana Tobacco Litigation to file amicus brief [854183-1] [96-20361, 96-20405] [96-20361 96-20405]

2/4/98 Motion filed by Law Professors Concerned with International Arbitration to file amicus brief [854217-1] [96-20361, 96-20405] [96-20361 96-20405]

- 2/4/98 Motion filed by International Group of F&I Clubs to file amicus brief [854539-1] [96-20361, 96-20405] [96-20361 96-20405]
- 2/4/98 Motion filed by Reinsurance Association of America to file amicus brief [859285-1] [96-20361, 96-20405] [96-20361 96-20405]
- * * *
- 2/9/98 Amicus curiae brief filed by Amicus Curiae Intl Grp of P&I in 96-20361, Amicus Curiae Intl Grp of P&I in 96-20405. Copies of Brief: 20 # of pages: 17. Date of COS: 2/4/98 Sufficient [Y/N]: y. [96-20361, 96-20405] [96-20361 96-20405]
- * * *
- 2/17/98 Amicus curiae brief filed by Amicus Curiae Certain Insr in 96-20361, Amicus Curiae Certain Insr in 96-20405. Copies of Brief: 20 # of pages: 16. Date of COS: 2/12/98 Sufficient [Y/N]: y. [96-20361, 96-20405] [96-20361 96-20405]
- * * *
- 2/17/98 Amicus curiae brief filed by Amicus Curiae Reinsurance Assoc in 96-20361, Amicus Curiae Reinsurance Assoc in 96-20405. Copies of Brief: 20 # of pages: 11. Date of COS: 2/4/98 Sufficient [Y/N]: y. [96-20361, 96-20405] [96-20361 96-20405]
- * * *
- 2/26/98 Amicus curiae brief filed by Amicus Curiae Law Professors in 96-20361, Amicus Curiae Law Professors in 96-20405. Copies of Brief: 20 # of pages: 18. Sufficient [Y/N]: n. no COS. [96-20361, 96-20405] Sufficient Brief

due on 3/9/98 for Law Professors in 96-20361, for Law Professors in 96-20405. [96-20361 96-20405]

* * *

- 5/18/98 Oral argument heard En Banc. Case argued by David John Schenck for Appellant-Cross-Appellee Marathon Oil Comp, Appellant-Cross-Appellee Marathon Intl Oil Co, Appellant-Cross-Appellee Marathon Petro Norge in 96-20361, J Gregory Taylor for Appellant-Cross-Appellee Marathon Oil Comp, Appellant-Cross-Appellee Marathon Intl Oil Co, Appellant-Cross-Appellee Marathon Petro Norge in 96-20361, Ben H Sheppard for Appellee-Cross-Appellant A G Ruhrgas in 96-20361, David John Schenck for Appellant-Cross-Appellee Marathon Oil Comp, Appellant-Cross-Appellee Marathon Intl Oil Co, Appellant-Cross-Appellee Marathon Petro Norge in 96-20405, J Gregory Taylor for Appellant-Cross-Appellee Marathon Oil Comp, Appellant-Cross-Appellee Marathon Intl Oil Co, Appellant-Cross-Appellee Marathon Petro Norge in 96-20405, Ben H Sheppard for Appellee-Cross-Appellant A G Ruhrgas in 96-20405. [96-20361, 96-20405] [96-20361 96-20405]

- 5/18/98 CLERK Order filed denying motion for reconsideration to file amicus brief of "Certain Insurer Defendants" [861243-1] in 96-20361, 96-20405, denying motion for reconsideration to file amicus brief of "Certain Insurer Defendants" [861243-1] in 96-20361, 96-20405 Copies to all counsel. The

motion of the "Certain Insurer Defendants in Louisiana Tobacco Litigation" to file a brief as amicus curiae is DENIED and their brief stricken. [96-20361, 96-20405] [96-20361 96-20405]

* * *

6/22/98 Opinion filed, Issd in T form? y Issue Mandate due on 7/13/98 in 96-20361, in 96-20405. [96-20361, 96-20405] [96-20361 96-20405]

No. 95-32957

MARATHON OIL	§	IN THE DISTRICT
COMPANY, MARATHON	§	COURT
INTERNATIONAL OIL	§	OF HARRIS COUNTY,
COMPANY, and	§	TEXAS
MARATHON	§	152d JUDICIAL
PETROLEUM NORGE	§	DISTRICT
A/S	§	
Plaintiffs,	§	
v.	§	
RUHRGAS, A.G.	§	
Defendant.	§	

PLAINTIFFS' FIRST AMENDED PETITION

Plaintiffs Marathon Oil Company, Marathon International Oil Company, and Marathon Petroleum Norge A/S (collectively "Plaintiffs" or "Marathon") assert the following claims against Ruhrgas, A.G.

PARTIES

1. Marathon Oil Company is an Ohio corporation that maintains its principal office at 5555 San Felipe, Houston, Harris County, Texas 77056.
2. Marathon International Oil Company is a Delaware corporation that maintains its principal place of business at 5555 San Felipe, Houston, Harris County, Texas 77056.
3. Marathon Petroleum Norge A/S ("MPN") is a Norwegian corporation that maintains its principal office at 5555 San Felipe, Houston, Harris County, Texas 77056.

4. Defendant Ruhrgas, A.G. ("Ruhrgas") is a German corporation that maintains its principal office at Huttropstr. 60, 45138 Essen, Germany. Among other connections to Texas, Ruhrgas owns a 20% interest in Texas-based Tenneco Oil Company. This defendant has done business in the State of Texas within the meaning of § 17.042 of the Texas Civil Practice and Remedies Code, out of which a portion of this suit arises, but has not designated an agent upon which service of process may be made. Pursuant to the Hague Convention, Ruhrgas may be served by delivering two copies of this petition translated into German, to Der Justizminister des Landes Nordrhein-Westfalen, D 4000 Duesseldorf, Germany. The Minister of Justice then will forward this petition to Ruhrgas. Alternatively, Ruhrgas may be served in accordance with Texas Civil Practice & Remedies Code § 17.041, *et seq.*, which deems the Secretary of State to be Ruhrgas's agent.

VENUE

5. Venue is proper in Harris County pursuant to Tex. Civ. Prac. & Rem. Code § 15.007 because the defendant is a foreign corporation with no agent or representative in this state, and certain of the plaintiffs reside in Harris County. Furthermore, some of the causes of action alleged in this petition arose, in whole or in part, in Houston, Harris County, Texas.

FACTUAL BACKGROUND

6. This case arises out of a conspiracy among Ruhrgas, Den Norske Stats Oljeselskap A.S. ("Statoil"), and others to monopolize the Western European market for natural gas. Pursuant to this conspiracy, Ruhrgas participated in a series of interconnected wrongful

acts relating to the solicitation for funding, development and subsequent operation of gas fields in the North Sea off the coast of Norway. The wrongful conduct alleged in this petition has been continuing for many years, has caused continuing injury to Plaintiffs, and still is ongoing. Plaintiffs are seeking to recover the damages they have sustained over the years as a proximate result of Ruhrgas' continuing torts.

History of Gas Development in the North Sea

7. In order to appreciate the nature and extent of Ruhrgas' wrongful conduct, one first must understand the historical factors leading up to the development of gas in the North Sea. From the mid 1960's to the early 1970's, the largest source of natural gas for the Western European market was the Groningen field in Holland. Between 1965 and 1974, this field serviced a steadily growing demand for natural gas in Holland, France, Belgium and West Germany. By 1975, however, Gasunie (the Dutch state-owned gas company) had determined that the Groningen field would be insufficient to meet Holland's future needs if gas exports continued. As a result, Gasunie began to phase out its natural gas exports, leaving gas buyers in Western Europe scrambling to find a stable new source of high-quality gas.
8. Although both the Soviet Union and Algeria had gas in exportable quantities, many Western European buyers did not consider these sources stable enough for long-term dependence due to the political climates in those countries. Instead, the most promising source for Western Europe's long term natural gas needs were gas reserves located beneath the North Sea. Most of these reserves had not, however, been commercially developed as of the mid-1970's,

and were located so far from any coastline that development and transportation would be expensive, if not prohibitive.

9. Ownership of the North Sea gas reserves was divided between Norway and Great Britain by treaty. By the early 1970's, Great Britain already was producing some North Sea gas for its own domestic consumption, as was Norway to a lesser extent. Norway's natural gas operations were conducted by Statoil, Norway's state owned oil and gas company.
10. Statoil saw the Western European gas demand as creating a potential bonanza for itself. If Statoil could develop the North Sea fields and locate a long-term, reliable purchaser for large amounts of gas, Statoil could become Western Europe's primary gas supplier and reap tremendous profits for years to come.

Ruhrgas' Conspiracy with Statoil

11. Ruhrgas is Germany's largest gas company, controlling more than 80% of the German market for natural gas. In the 1970's, Ruhrgas, along with several other gas buyers, formed a cartel known as the "Consortium" or the "Grand Alliance." The goal of this Ruhrgas-led Consortium was to divide up the European gas market among themselves and control the distribution of gas throughout the European continent. Once Gasunie began decreasing its exports of natural gas, Ruhrgas and its Consortium immediately turned to Statoil as a potential supplier.
12. Following a series of closed door meetings and negotiations, Statoil agreed to sell the vast majority of its North Sea gas to Ruhrgas and its Consortium, and the parties jointly launched a plan to monopolize the Western European gas market. Pursuant to

this plan, the few Norwegian North Sea gas fields then in operation were to be linked by a pipeline known as "Norpipe" to a gas facility owned by Ruhrgas in Emden, Germany. Thus Ruhrgas would be able to control the distribution of all gas then being produced in the southern portion of the North Sea.

13. Both Ruhrgas and Statoil knew that the few fields producing North Sea gas in the mid-1970's never would provide enough gas to satisfy the Western European market. In order to monopolize that market, Ruhrgas and Statoil would have to ensure a stable supply of gas for years to come by tapping into potentially large but still undeveloped gas reserves further north. For Ruhrgas' and Statoil's plan to succeed, platforms to exploit such reserves would have to be funded and developed, and a new pipeline would have to be constructed to connect the new fields to the Norpipe system (and thus to Europe through Ruhrgas' facility in Emden). Unfortunately, developing gas fields in the North Sea is an incredibly expensive proposition. Thus, the conspirators sought to interest other companies, including Marathon, in sharing the costs associated with developing the northern fields, building platforms, and constructing a gas pipeline system to transport the gas to Emden.

The Development of Heimdal

14. One of the undeveloped North Sea fields was the Heimdal gas field. In 1972, Pan Ocean Oil, Ltd. had discovered the Heimdal gas field in Norway's portion of the North Sea. The Heimdal field was declared commercial in 1974, roughly the same time that Gasunie informed its Western European gas buyers that they would have to look elsewhere for

natural gas. At the time, Pan Ocean planned to connect the Heimdal field (which had only marginal gas reserves) to a neighboring field via a short pipeline, and then ship the gas to Great Britain through an existing pipeline. In 1975 Statoil exercised an option to take a 40% equity interest in Heimdal and entered into an Operating Agreement with, *inter alia*, Pan Ocean Oil Norge A/S, Pan Ocean's Norwegian subsidiary, to develop the field.

15. Marathon acquired Pan Ocean in 1976, and with it a 24% interest in the field. Marathon's acquisition made in Heimdal's second-largest equity interest holder and a joint venture partner with Statoil. Marathon also acquired Pan Ocean Oil Norge A/S, which held the license to Heimdal, and subsequently renamed the company Marathon Petroleum Norge A/S.
16. In the late 1970's and early 1980's, Statoil and Ruhrgas were seeking to obtain control of the sale and distribution of gas from three North Sea fields: Heimdal, Gulffaks and Statfjord. Only with all three fields committed, and with the financial commitment of the licensees of each (including MPN), could enough money be raised to build a pipeline to link these northern regions (and other potential Norwegian reserves even further north) to Ruhrgas' Emden facility. Thus Ruhrgas and Statoil plotted to obtain a commitment from Marathon, and others to commit the funds necessary to enable them to effect their monopolistic scheme.
17. Shortly after MPN became a venture partner, Statoil suggested that Heimdal be connected to the European continent rather than to Great Britain. Such a connection would require the construction of a new and longer pipeline (later called "Statpipe") to connect Heimdal to the existing Norpipe system, which

conveniently landed at Ruhrgas' facility in Emden. Statoil proposed that the cost of constructing such a pipeline be recouped from the joint venturers by means of a high transportation charge or "tariff" on all gas flowing through the pipeline until the construction costs were recovered.

18. Naturally, Plaintiffs were concerned about bearing such a cost (particularly given that a pipeline to Britain would have been cheaper), but Statoil assured Marathon that the venture partners would be able to charge a premium price for Heimdal gas that would be more than sufficient to offset the tariff costs. Such a premium price was essential – given the high costs associated with developing the Heimdal field, and the relatively small amount of gas in the field, only a premium price would provide an adequate return on investment sufficient to justify the cost of development.
19. In order to convince Plaintiffs and the Heimdal joint venture partners that they would be assured of obtaining the required premium price, Statoil began "negotiating" with potential gas buyers before any substantial funds were committed to develop the field. Of course, Statoil's talks centered primarily, if not exclusively, on Ruhrgas and the Consortium. Ruhrgas and its Consortium agreed to pay the Heimdal venturers a premium price if the field were developed and connected to the Norpipe system. Indeed, Ruhrgas and the Consortium even signed a "Heads of Agreement" promising to pay the venturers a formula then yielding \$5.50 per million BTU's (\$6.16/mcf) for Heimdal gas. Such a price would have provided the venturers with a sufficient premium to economically develop the field and pay the Statpipe tariff. Based on these oral and written

assurances, Marathon agreed to provide their subsidiaries and affiliates with sufficient capital to enable them to fund the development of the Heimdal field and to support the proposed Statpipe pipeline.

Ruhrgas' and Statoil's Secret Agreements

20. During the negotiations leading up to Ruhrgas' representations and agreements to purchase gas at a premium price, Statoil and Ruhrgas representatives conducted several secret meetings. Upon information and belief, Statoil and Ruhrgas agreed that Statoil would force the Heimdal venturers to sell the gas to Ruhrgas and the Consortium through a pipeline to be connected to Ruhrgas' facility at Emden. The Heimdal venturers would be "locked" into the Ruhrgas pipeline system with no other means of selling their gas. Marathon, of course, never was told of this secret agreement.
21. Based on Ruhrgas' representations and agreements, Marathon advanced over \$300 million to their subsidiaries and affiliates for the development of the Heimdal field. Statoil and Ruhrgas never disclosed to Plaintiffs: (a) that they were attempting to monopolize the Western European gas market and prevent sales to any other gas buyers; (b) that connecting Heimdal to Europe (instead of Great Britain) through Ruhrgas' Emden facility was part of their overall monopolistic plan; or (c) that Ruhrgas never intended to pay the promised premium price for gas. Had Marathon been told of these facts, Marathon never would have advanced any funds for the development of the Heimdal field and the support of Statpipe, and MPN could have recovered its capital investment in the Heimdal license.

22. Also unbeknownst to Plaintiffs was the fact that Statoil had discovered a huge gas reserve north of Heimdal that ultimately became known as the Troll field. The Troll field was forty times larger than Heimdal, and had the potential of providing Statoil and Ruhrgas with the gas necessary to permit them to realize their goal of monopolizing the Western European gas market.

Ruhrgas Uses Coercion to Lower Gas Prices

23. After discovering the Troll field, Statoil began negotiating a gas sales contract with Ruhrgas and the Consortium to cover the new gas. Statoil was anxious to obtain a long-term commitment for the sale of Troll gas. Ruhrgas, in turn, wished to (1) lower all North Sea gas prices to boost its monopoly profits, and (2) obtain the rights to all Norwegian reserves for the Consortium to assure a stable supply for its monopoly for many years to come. In secret negotiations these conspirators reached an agreement to commit Troll gas to Ruhrgas at a much reduced price (initially around \$2.201 per mcf), and Ruhrgas induced Statoil to commit to lowering North Sea gas prices at all other Norwegian fields, including Heimdal. Statoil made its decision to lower all North Sea gas prices for Ruhrgas' benefit despite the fact that Marathon and others had made, and were continuing to make, enormous investments in developing the Heimdal field based on the assurance of premium prices.
24. Following Statoil's secret agreement to lower all North Sea gas prices to the Troll level, Ruhrgas immediately demanded that all Heimdal licensees lower their gas prices because the Troll price allegedly had set the market price for North Sea gas. When Marathon's affiliate refused to lower the gas

price from the agreed-upon premium amount, Ruhrgas and the other Consortium members simply continued taking Heimdal gas from Ruhrgas' Emden facility but began paying less for it.

25. By the time Ruhrgas and the other Consortium members began these wrongful acts, Marathon was trapped. The Heimdal gas reserves (and any hope of recovering on the loans and the value of the license) were locked into a single pipeline that transported its gas to a facility completely controlled by Ruhrgas. When the possibility of securing non-Consortium buyers was raised in light of Ruhrgas' flagrant wrongful conduct, Ruhrgas advised that it would not allow any such purchasers to access Heimdal gas. In other words, Marathon's affiliate was forced to choose between selling its gas to Ruhrgas at a loss, or not selling its gas at all.
26. In response to the breach of the gas sales agreement by Ruhrgas and the Consortium, the Marathon affiliate that had entered into the contract with the Consortium initiated arbitration. The arbitration resulted in a finding that Ruhrgas and most Consortium members were obligated to pay the proper and agreed-upon contract price for the Heimdal gas.
27. The arbitration was not a total victory, however: another Consortium member (Distrigaz, the Belgian state gas company) was excused from performing under its contracts, leaving Plaintiffs without a buyer for approximately 15% of the gas. Thus, although initially victorious over Ruhrgas, the net result from arbitration still left Marathon's affiliates operating at a substantial loss. Furthermore, Ruhrgas expressly advised that it would not permit the Distrigaz volumes to be sold to any competitor of the Consortium.

28. Ruhrgas appealed the arbitration award and indicated that it would seek relief under a "hardship" clause of its gas sales contract because the Troll price allegedly had lowered the market value for North Sea gas. (In other words, through its conspiracy with Statoil, Ruhrgas effectively had lowered the market price for all North Sea gas. It then claimed that it suffered a hardship (and would lose money) by having to pay more than this new "market" price.).
 29. Given Ruhrgas' threats and its obvious ability to control the sale of all of the gas from Marathon's license, Marathon and its affiliates were left with no choice but to accede to Ruhrgas' demands. Faced with this economic coercion from Ruhrgas acting from its controlling positions in the Western European gas market, Marathon's affiliate agreed to an amendment of the gas sales contracts that provided for a reduction in the sales price over a period of time beginning in 1992 that ultimately would reach the Troll price level. The negotiations leading up to this agreement, along with the economic coercion described above, took place in Houston, Harris County, Texas.
- Statoil's Representations Induced Marathon Into Not Filing Suit**
30. In the course of the negotiation with Ruhrgas and the Consortium, Marathon considered further litigation against Ruhrgas to recover the damages up to that point. Statoil, however, assured Marathon that once the Troll field was in production and its gas was flowing through Statpipe, tariff prices would decline and thereby assuring Marathon that its investment would improve. Statoil provided projections indicating that Troll would be connected to Statpipe, that gas volumes flowing through Statpipe

necessarily would increase, and that the tariff on all gas flowing through the pipeline correspondingly would decrease. These projections were sent to Marathon in Houston, Texas. Based on Statoil's assurances, Marathon refrained from further litigation with Ruhrgas.

31. Unfortunately, Statoil only told Marathon half of the story. Upon information and belief, Statoil and Ruhrgas had not agreed to ship the Troll volumes through Statpipe. In fact, Statoil had determined to ship gas from its newer gas fields through a separate pipeline system bypassing Statpipe. Thus Statoil either negligently misrepresented or fraudulently represented to Marathon that this gas would be available to lower the Statpipe tariff.
32. Statoil continued to send projections to Marathon in Houston, Texas for several years that indicated the Troll field would be connected to Statpipe and that tariffs then would decrease. Earlier this year, however, Statoil announced for the first time that Troll would *not* be connected to Statpipe – instead, its gas would be transported to Europe through a new pipeline. Thus Statoil and Ruhrgas have left Marathon and its affiliates to continue incurring debilitating losses without any reduction in expenses as promised. Had Statoil not made misrepresentations to Marathon regarding increased shipments of gas through Statpipe and the related cost reductions, Plaintiffs would have filed this action years ago.

Plaintiffs' Damages

33. As a result of these wrongful activities, Marathon have suffered, and continue to suffer, tremendous losses. Furthermore, given that Marathon now will be unable to repay any of the advances Ruhrgas induced Marathon to make to develop the Heimdal

field and support Statpipe, Marathon will suffer and recognize a loss of its capital investment this year. To add insult to injury, Statoil has attempted to take advantage of its wrongful acts and conspiratorial activities by offering to purchase MPN's license in Heimdal for a nominal price and thus freeze Plaintiffs out of the field they helped develop. The result of Ruhrgas' wrongful acts is to render MPN's license virtually worthless.

34. Ruhrgas' and Statoil's actions as alleged above were (and are) part of a single ongoing plan aimed at controlling the Western European gas market and duping others into funding the development of North Sea gas fields and pipeline systems for Statoil's and Ruhrgas' benefit. The wrongful activities of Ruhrgas and Statoil have been continuing for years, and continue to effect additional injury to Plaintiffs every day: in addition to the staggering loss of the initial investment, Plaintiffs are incurring substantial losses each month on the Heimdal operations.
35. Both Statoil and Ruhrgas fraudulently concealed their secret agreements from Marathon. Had Plaintiffs known the truth about Ruhrgas' and Statoil's relationship and plans, they never would have agreed (1) to commit hundreds of millions of dollars to develop the Heimdal field, and (2) to support a pipeline to Europe that landed in a facility controlled by Ruhrgas.

CAUSES OF ACTION

FRAUD

36. Plaintiffs reallege the allegations contained in the preceding paragraphs, and incorporate them by reference.

37. As part of its continuing tortious activity, Ruhrgas made numerous material misrepresentations to Marathon. Among other things, Ruhrgas represented to Marathon that it would pay a premium price for Heimdal gas in exchange for (a) Marathon's agreement to fund the development of the Heimdal gas reserves; (b) Marathon's support for connecting Heimdal to Ruhrgas' facility in Emden; and (c) Marathon's agreement to help underwrite the construction costs for Statpipe.
38. Ruhrgas never intended to honor its promises to pay a premium price for Heimdal gas. To the contrary, Ruhrgas merely promised to pay such prices to induce Marathon to fund the development of the field and the construction of a pipeline to Emden. Ruhrgas always intended to pay a lower price once the pipeline was constructed and there was then no other avenue for selling the gas.
39. Ruhrgas intended that Plaintiffs would act upon these misrepresentations by advancing the funds necessary to develop Heimdal, and Plaintiffs justifiably relied upon such misrepresentations to their detriment. Had Ruhrgas not made these misrepresentations, Plaintiffs never would have advanced any funds for the Heimdal field's development.
40. As a proximate result of Ruhrgas' fraud, Plaintiffs sustained actual damages in an amount far in excess of this Court's jurisdictional limits, for which Plaintiffs now sue.
41. Ruhrgas' actions as alleged above were willful, knowing, intentional, outrageous and malicious. Given the surrounding circumstances, Ruhrgas either intended, or should have known, that its conduct created an extreme degree of risk and peril to Plaintiffs, a high probability of serious injury to Plaintiffs, and a genuine likelihood of financial

catastrophe for Plaintiffs. Accordingly, Plaintiffs also sue for punitive damages in an amount of at least four times their actual damages.

TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONSHIPS

42. Plaintiffs reallege the allegations contained in the preceding paragraphs, and incorporate them by reference.
43. From the inception of the Heimdal field's development, and particularly after Ruhrgas demanded a price renegotiation, Marathon's affiliate sought to identify and establish relationships with European gas buyers other than Ruhrgas and the Ruhrgas-led Consortium.
44. In response, Ruhrgas representatives told Marathon that Ruhrgas would not allow the Heimdal gas to be transported through its facilities to any competing gas buyer.
45. Ruhrgas has made good on its threat. To date, it has refused to permit non-Consortium buyers to access the gas originally allocated to the Consortium under the gas sales agreements. This interference has been continuous and still is on-going. For example, Ruhrgas now is refusing to recognize the termination of the gas sales contract between the parties, and its refusing to provide certain necessary gas transportation cost information to enable a sale to other buyers.
46. Marathon's affiliate had (and has) a reasonable probability of entering into business relationships with other gas buyers. Ruhrgas maliciously and intentionally prevented (and still is preventing) those relationships from occurring. Ruhrgas' purpose in interfering with these prospective relationships is to

harm Plaintiffs, and Ruhrgas is not privileged or justified in such interference.

47. As a proximate result of Ruhrgas' tortious interference as alleged above, Plaintiffs have sustained, and continue to sustain, actual damages in an amount far in excess of this Court's jurisdictional limits, for which they now sue.
48. Ruhrgas' actions as alleged above were willful, knowing, intentional, outrageous and malicious. Given the surrounding circumstances, Ruhrgas either intended, or should have known, that its conduct created an extreme degree of risk and peril to Plaintiffs, a high probability of serious injury to Plaintiffs, and a genuine likelihood of financial catastrophe for Plaintiffs. Accordingly, Plaintiffs also sue for punitive damages in an amount of at least four times their actual damages.

PARTICIPATION IN BREACH OF FIDUCIARY DUTY

49. Plaintiffs reallege the allegations contained in the preceding paragraphs, and incorporate them by reference.
50. As alleged above, Statoil and MPN are joint venture partners. This relationship gives rise to formal fiduciary duties owed by Statoil to MPN.
51. As a result of its relationship with Statoil, MPN trusted and relied on Statoil, and was justified in placing confidence in the belief that Statoil would act in MPN's best interest. Accordingly, MPN's relationship with Statoil was a confidential and special relationship, as well as a formal fiduciary relationship.
52. Among other things, Statoil owed MPN a duty to fully disclose all material facts, a duty not to seek an advantage for itself at MPN's expense, a duty of

loyalty, and a duty of good faith and fair dealing. Statoil's breaches of fiduciary duties to MPN have been continuous, and have caused MPN continuous injury. Examples of steps taken by Statoil include, among other things:

- a) agreeing to lower all North Sea gas prices to assist Ruhrgas, contrary to the promises it had made to Plaintiffs and to Plaintiffs' detriment;
 - b) conspiring with Ruhrgas to monopolize the market for North Sea gas to Plaintiffs' detriment;
 - c) providing projections showing that Troll gas would flow through Statpipe when Statoil knew, or should have known, that those projections were erroneous; and
 - d) failing to disclose its agreements with Ruhrgas that necessarily worked to Plaintiffs' detriment.
53. Ruhrgas was aware that Statoil and MPN were joint venturers, and that Statoil owed fiduciary duties to MPN. Nevertheless, Ruhrgas knowingly aided, abetted, induced, and/or participated in the breach of Statoil's fiduciary duties as alleged above. Accordingly, Ruhrgas is jointly and severally liable for any damages Plaintiffs sustained as a result of Statoil's breaches of fiduciary duty.
 54. As a proximate result of Statoil's breaches of its fiduciary duties, and Ruhrgas' participation in those breaches, Plaintiffs sustained actual damages in an amount far in excess of this Court's jurisdictional limits, for which Plaintiffs now sue.
 55. Ruhrgas' actions as alleged above were willful, knowing, intentional, outrageous and malicious. Given the surrounding circumstances, Ruhrgas either intended, or should have known, that its conduct created an extreme degree of risk and peril to

Plaintiffs, a high probability of serious injury to Plaintiffs, and a genuine likelihood of financial catastrophe for Plaintiffs. Accordingly, Plaintiffs also sue for punitive damages in an amount of at least four times its actual damages.

CONSTRUCTIVE FRAUD

56. Plaintiffs reallege the allegations contained in the preceding paragraphs, and incorporate them by reference.
57. Ruhrgas' participation in Statoil's breaches of fiduciary duties constitutes the breach of both legal and equitable duties owed to Plaintiffs. Such breaches are constructively "fraudulent" because of their tendency to deceive others, violate confidence, and injure public interests.
58. As a proximate result of Ruhrgas' constructive fraud, Plaintiffs have sustained actual damages in an amount far in excess of this Court's jurisdictional limits, for which they now sue.

CIVIL CONSPIRACY

59. Plaintiffs reallege the allegations contained in the preceding paragraphs, and incorporate them by reference.
60. Ruhrgas and Statoil conspired between themselves and with others to (i) fraudulently induce Marathon to fund the development of the Heimdal field, (ii) lower North Sea gas prices generally, and then (iii) force Marathon to accede to such prices, by means of misrepresentations, improper threats, breaches of fiduciary duty, and fraud. This plan was accomplished through the fraud, breaches of fiduciary

duties, and other actions alleged above. This conspiracy was designed to result in:

- a) Marathon committing over \$300 million to develop the Heimdal gas field and subsidize a European pipeline;
 - b) Statoil having a guaranteed long-term buyer for gas produced in its Troll field;
 - c) Ruhrgas and Statoil controlling the price and distribution of Heimdal gas;
 - d) Ruhrgas being able to purchase gas from all North Sea fields at lower prices than provided in its contracts;
 - e) Ruhrgas and Statoil effectively controlling the flow of gas from major North Sea fields and monopolizing the sale of North Sea gas in Western Europe;
 - f) Statoil using Plaintiffs and other gas producers to fund the construction of an undersea pipeline to Europe (for Statoil's and Ruhrgas' benefit) through excessive tariffs;
 - g) Ruhrgas and Statoil attempting to prevent, restrict or distort competition by, among other things, directly or indirectly fixing prices, and limiting or controlling markets; and
 - h) Ruhrgas and Statoil abusing a dominant position within the market.
61. Ruhrgas and Statoil conspired among themselves and others to accomplish both (a) unlawful purposes and (b) lawful purposes through unlawful means as alleged above. Both Ruhrgas and Statoil have committed, and continue to commit, numerous overt acts in furtherance of this conspiracy, including the breaches of fiduciary duties and misrepresentations

previously alleged. Accordingly, Ruhrgas is jointly and severally liable for all damages sustained by Plaintiffs due to this civil conspiracy.

62. As a proximate result of Ruhrgas' and Statoil's civil conspiracy, Plaintiffs have sustained actual damages in an amount far in excess of this Court's jurisdictional limits, for which they now sue.
63. Ruhrgas' actions as alleged above were willful, knowing, intentional, outrageous and malicious. Given the surrounding circumstances, Ruhrgas either intended, or should have known, that its conduct created an extreme degree of risk and peril to Plaintiffs, a high probability of serious injury to Plaintiffs, and a genuine likelihood of financial catastrophe for Plaintiffs. Accordingly, Plaintiffs also sue for punitive damages in an amount of at least four times their actual damages.

JURY DEMAND

64. Plaintiffs request that this matter be decided by trial to jury, and hereby tender the required jury fee.

WHEREFORE PREMISES CONSIDERED, Plaintiffs pray that this matter be placed on the Court's jury docket, and that after a trial on the merits, the Court enter judgment awarding Plaintiffs:

- (1) Actual damages;
- (2) Punitive damages of not less than four times actual damages;
- (3) Prejudgment and post-judgment interest allowed by law;
- (4) Costs of Court; and

- (5) Such other and further relief as to which Plaintiffs are entitled.

Respectfully submitted,

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**ATTORNEYS FOR
 PLAINTIFFS MARATHON
 OIL COMPANY,
 MARATHON
 INTERNATIONAL OIL
 COMPANY, AND
 MARATHON PETROLEUM
 NORGE A/S**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY,	§	
MARATHON INTERNATIONAL	§	
OIL COMPANY, and	§	CIVIL ACTION
MARATHON PETROLEUM	§	NO. H-95-4176
NORGE A/S,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	
	§	
RUHRGAS, A.G.,	§	
	§	
Defendant.	§	

NOTICE OF REMOVAL

(Filed Aug. 21, 1995)

TO THE UNITED STATES DISTRICT COURT:

Defendant Ruhrgas AG, expressly reserving all of its rights to respond to this lawsuit, including objections to lack of personal jurisdiction and improper service on a foreign defendant, submits this Notice of Removal of the above-styled matter pursuant to the provisions of 28 U.S.C. §§ 1331 and 1332(a)(2), 9 U.S.C. §§ 203 and 205, and 28 U.S.C. § 1441, and in support thereof would show as follows:

1. The above-styled action was filed by Plaintiffs against Defendant in the 152nd Judicial District Court of Harris County, Texas, and is pending in that court under

Cause No. 95-32957. True and correct copies of all executed process, pleadings asserting causes of action, orders signed by the state judge, and the docket sheet that are on file with the 152nd Judicial District Court of Harris County, Texas, are attached as Exhibit "A" and incorporated by reference for all purposes. This Notice of Removal is also based upon the Declaration of Lutz K. Eckert and referenced Exhibits, which are attached as Exhibit "B" and incorporated by reference for all purposes.

2. In this case, Plaintiffs attempt to recover damages in tort arising out of an agreement for the sale of natural gas produced in the Norwegian North Sea between Ruhrgas AG and Marathon Petroleum Company (Norway) ("MPCN"), an affiliate of the Plaintiffs, even though (1) MPCN is not a plaintiff, and (2) the agreement provides for mandatory arbitration.

3. This action is removable under 9 U.S.C. § 205 because the subject matter of this action relates to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, reprinted at the note following 9 U.S.C. § 201 ("the Convention"). The claims and causes of action asserted herein by the Plaintiffs arise out of or relate to an agreement dated March 2, 1984 between MPCN, as Seller, and numerous Buyers, including Defendant, concerning the sale of gas produced from the Heimdal Field in the North Sea off of the coast of Norway and an amendment thereto dated May 11, 1990 (collectively "the Agreement"), attached hereto as Exhibit "B", Tab 1. Article 15 of the Agreement provides in pertinent part:

All claims, disputes and other matters arising out of or relating to this Agreement which the Parties are unable to resolve by mutual agreement within forty-five (45) days of the date the dispute first arose, except those matters that are to be referred to an expert in accordance with the terms and procedures set forth in Article 14 hereof, shall exclusively and finally be settled by arbitration in Stockholm, Sweden, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce in Paris, or in the absence of any applicable rule, with the Procedural Laws of Sweden.

This action falls under the Convention because (1) the Agreement provides for arbitration in Sweden, which is a signatory to the Convention, (2) Defendant is not an American citizen, (3) the arbitration clause of the Agreement arises out of a commercial legal relationship, and (4) Article 15 of the Agreement constitutes an agreement in writing to arbitrate the disputes which are the subject of the claims and causes of actions asserted herein.

4. The arbitration provisions of the Agreement apply to Plaintiffs' claims because (1) the Plaintiffs' claims are founded in and intertwined with the underlying contractual obligations set out in the Agreement and the amendment thereto and are inherently inseparable from the issues governed by the arbitration agreement set forth in Article 15 of the Agreement, and (2) the damages sought by Plaintiffs flow directly from harm allegedly suffered by MPCN and Plaintiffs' status as affiliates of MPCN. See *McBro Planning and Development Co. v. Triangle Electrical Construction Co., Inc.*, 741 F.2d 342, 344 (11th Cir.

1984); *J.J. Ryan & Sons, Inc. v. Rhone-Poulenc Textile, SA.*, 863 F.2d 315, 320 (4th Cir. 1988). Specifically, Plaintiffs' claims arise out of and relate to the price of gas produced from the Heimdal Field and sold by MPCN to Defendant and others pursuant to the Agreement, which contains provisions relating to price. Plaintiffs' First Amended Petition shows on its face that the claims asserted herein are based on Defendant's alleged failure to pay a higher price for the gas covered by the Agreement. See First Amended Petition ¶¶ 24, 25, 29, 37, 38, 43, 52, and 60 (Exhibit "A", Tab 1). Plaintiff Marathon Oil Company has acknowledged that the alleged damages sought in this action arise from the alleged "negative cash flow of MPCN" and that those alleged damages were incurred as a result of Defendant's "lowering of gas prices since 1992." See Exhibit "B", Tab 2. Similarly, MPCN has described the alleged damages of Marathon Oil Company as losses resulting from advances of funds to MPCN "to cover MPCN's continuing losses." See Exhibit "B", Tab 3. At all relevant times, the rights and obligations under the license which forms the predicate for the claims of Plaintiff Marathon Petroleum Norge A/S ("MPN"), see First Amended Petition ¶¶ 16, 17, 21, and 33 (Exhibit "A", Tab 1), have been exercised and performed by MPCN pursuant to Pass Through Agreements dated June 25, 1975 and October 23, 1978. See Exhibit "B", Tabs 4 and 5. In short, all of the claims asserted by all of the Plaintiffs herein (1) arise from and relate to the contractual relationship and dealings between MPCN and Defendant under the Agreement and (2) seek recovery of damages directly flowing from harm allegedly suffered by MPCN as a result of Defendant's alleged conduct during the

course of that contractual relationship and those dealings. The subject matter of this action therefore relates to an arbitration agreement falling under the Convention providing this Court with original jurisdiction of this action under 9 U.S.C. § 203 and making this action removable under 9 U.S.C. § 205.

5. Diversity jurisdiction exists pursuant to 28 U.S.C. § 1332(a)(2), which provides for jurisdiction in suits between "citizens of a State and citizens or subjects of a foreign state." The First Amended Petition alleges that Plaintiff Marathon Oil Company is an Ohio corporation that maintains its principal office in Texas and that Plaintiff Marathon International Oil Company is a Delaware corporation that maintains its principal place of business in Texas. First Amended Petition ¶¶ 1, 2 (Exhibit "A", Tab 1). Defendant Ruhrgas AG is a German company with its principal place of business in Germany.

6. Plaintiff Marathon Petroleum Norge A/S ("MPN"), allegedly a Norwegian corporation with its principal office in Texas, was joined as a party plaintiff fraudulently and for the purpose of defeating diversity. Furthermore, MPN is not a real party in interest in this action and should not be considered for diversity jurisdiction purposes. MPN alleges that Ruhrgas' alleged tortious conduct rendered its license in the Heimdal field virtually worthless. First Amended Petition ¶ 33 (Exhibit "A", Tab 1). However, MPN's 1994 Annual Report indicates that it no longer holds any rights under the license:

Marathon Petroleum Norge A/S is the registered holder of an interest in Norwegian Production License 036 (Block 25/4) [in the

Heimdal Field]. The company's rights and obligations in respect of this License have been exercised and performed by Marathon Petroleum Company (Norway) under Pass Through Agreements dated June 25, 1975 and October 23, 1978.

Exhibit "B", Tabs 4 and 5. In addition, the statement of profit and loss for Marathon Petroleum Norge A/S indicates it had no operating activities in 1993 and 1994. See Exhibit "B", Tabs 6 and 7. MPN's own documents demonstrate that during the relevant time period it did not hold any rights under the license, and accordingly, it is not a real party in interest in this action. As such, MPN's citizenship should be ignored in determining diversity. Even if the citizenship of the real party in interest, MPCN, is to be considered, diversity nevertheless exists because MPCN is a Delaware corporation and, on information and belief, maintains its principal place of business in Houston, Texas. Accordingly, diversity jurisdiction exists, and removal is proper pursuant to 28 U.S.C. § 1441.

7. Federal question jurisdiction exists under 28 U.S.C. § 1331 because Plaintiffs' claims raise substantial questions of foreign and international relations and questions of customary international law and act-of-state questions which are incorporated into and form part of the federal common law. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964). Plaintiffs allege that Den Norske Stats Oljeselskap A.S. ("Statoil"), which Plaintiffs acknowledge to be "Norway's state owned oil and gas company," see First Amended Petition ¶ 9 (Exhibit "A", Tab 1), has engaged in "wrongful acts and conspiratorial

activities," "negligently misrepresented or fraudulently represented" facts, committed "breaches of fiduciary duties," and engaged in a civil conspiracy with Ruhrgas AG. First Amended Petition ¶¶ 31, 33, 52, 60, 61 (Exhibit "A", Tab 1). These claims require resolution of issues of federal international relations law and therefore support federal question jurisdiction. *Grynberg Production Corp. v. British Gas, P.L.C.*, 817 F. Supp. 1338, 1365 (E.D. Tex. 1993). Further, because the interests of foreign countries in this litigation are substantial and international relations are affected, federal question jurisdiction exists. *Kern v. Jepsen Sanderson, Inc.*, 867 F. Supp. 525, 531-32 (S.D. Tex. 1994); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 62-63 (S.D. Tex. 1994). As such, removal is proper pursuant to 28 U.S.C. § 1441.

8. This Notice of Removal is filed timely, as thirty (30) days have not elapsed since Defendant Ruhrgas AG, the only defendant, first received notice, through service or otherwise, of a copy of a pleading, motion, order or other paper from which it may first have been ascertained that the case was removable. Specifically, Ruhrgas AG first received a copy of Plaintiffs' Original Petition through the mail on July 24, 1995. Although this does not constitute proper service of process under the Hague Service Convention, in an abundance of caution, Ruhrgas is removing the action today to avoid any possible claim of waiver of its right to remove the action.

9. All conditions and procedures for removal have been satisfied, including those required by Local Rule 3(K).

10. A filing fee of \$120.00 has been tendered to the Clerk of the United States District Court for the Southern District of Texas, Houston Division.

11. Defendant Ruhrgas AG has given written notice of the filing of this Notice of Removal to all adverse parties and will file a copy of the Notice of Removal with the Clerk of the 152nd Judicial District Court of Harris County, Texas.

Accordingly, Defendant removes this case now pending in the 152nd Judicial District Court of Harris County to this Court.

Respectfully submitted,

/s/ Ben H. Sheppard, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were served on all counsel of record by certified mail, return receipt requested this 21st day of August, 1995.

/s/ Ben H. Sheppard, Jr.
 BEN H. SHEPPARD, JR.

IN THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF TEXAS
 HOUSTON DIVISION

MARATHON OIL COMPANY,	§	
MARATHON INTERNATIONAL	§	
OIL COMPANY, and	§	
MARATHON PETROLEUM	§	CIVIL ACTION
NORGE A/S,	§	NO. H-95-4176
	§	
Plaintiffs,	§	
	§	
VS.	§	
	§	
RUHRGAS, A.G.,	§	
	§	
Defendant.	§	

**RUHRGAS AG'S MOTION TO DISMISS
 UNDER FED. R. CIV. P. 12(b)(2), (4), AND (5)**

(Filed Aug. 28, 1994)

TO THE HONORABLE UNITED STATES DISTRICT
 JUDGE:

RUHRGAS AG, in lieu of an answer, files this Motion to Dismiss Under Fed. R. Civ. P. 12(b)(2), (4), and (5) and moves the Court as follows:

1. To dismiss this action pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction over Ruhrgas AG. Ruhrgas AG does not have regular or continuous and systematic contacts with Texas. Further, this cause of action does not arise out of or relate to any contact between Ruhrgas AG and Texas. The evidence demonstrates that Ruhrgas AG lacks sufficient contacts with

Texas to support personal jurisdiction. Ruhrgas AG specifically denies the jurisdictional facts alleged by Plaintiffs.

2. Subject to the Court's ruling on personal jurisdiction, to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(4) and (b)(5) for insufficiency of process and insufficiency of service of process, or to quash service. The United States and the Federal Republic of Germany are signatories to the Hague Service Convention. Germany objects to service other than through the proper German central authority. Plaintiffs have not served Ruhrgas AG through that proper authority. Furthermore, the petition has not been translated into German.

3. This motion is supported by the following affidavits:

- a. Affidavit of Lutz K. Eckert, attached as Exhibit "A";
- b. Affidavit of Wolf-Dietrich W. Hoffmann, attached as Exhibit "B";
- c. Affidavit of Carl-Sylvius von Falkenhausen, attached as Exhibit "C";
- d. Affidavit of Eike Benke, attached as Exhibit "D"; and
- e. Affidavit of Dirk R. Plambeck, attached as Exhibit "E".

4. This motion is also supported by the memorandum filed simultaneously with the Motion. The memorandum and the attached exhibits are incorporated herein by reference for all purposes.

5. Ruhrgas AG reserves the right to amend its memorandum and to provide additional evidence in support of this motion.

WHEREFORE, RUHRGAS AG respectfully requests that (1) the Court dismiss this action for lack of personal jurisdiction, and (2) subject to the Court's ruling on personal jurisdiction, the Court dismiss Plaintiffs' claims pursuant to 12(b)(4) and (b)(5) or quash service.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on counsel of record for Plaintiffs by certified mail, return receipt requested this 28th day of August, 1995.

/s/ Ben H. Sheppard, Jr.
BEN H. SHEPPARD, JR.

IN THE UNITED STATES DISTRICT COURT FOR
 THE SOUTHERN DISTRICT OF TEXAS
 HOUSTON DIVISION

CIVIL ACTION NO. H-95-4176

MARATHON OIL COMPANY, MARATHON
 INTERNATIONAL OIL COMPANY and
 MARATHON PETROLEUM NORGE A/S,
 Plaintiffs,

VS.

RUHRGAS, A.G.,
 Defendant.

**RUHRGAS AG'S MEMORANDUM
 IN SUPPORT OF MOTION TO DISMISS UNDER
 FED. R. CIV. P. 12(b)(2), (4), AND (5)**

(Aug. 28, 1994)

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August 28, 1995

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

MARATHON OIL COMPANY,)	
MARATHON INTERNATIONAL)	
OIL COMPANY, and)	
MARATHON PETROLEUM	)	CIVIL ACTION
NORGE A/S,	)	NO. H-95-4176
Plaintiffs,)	
)	
VS.)	
)	
RUHRGAS, A.G.,)	
)	
Defendant.)	

RUHRGAS AG'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(2), (4) AND (5)

TO THE HONORABLE UNITED STATES DISTRICT
JUDGE:

Ruhrgas AG respectfully submits this Memorandum
in Support of Motion to Dismiss Under Fed. R. Civ. P.
12(b)(2), (4) and (5).

I.

INTRODUCTION

The claims asserted in this lawsuit arise out of and relate to natural gas produced from the Heimdal Field in the Norwegian North Sea which Marathon Petroleum Company (Norway) ("MPCN"), an affiliate of the Plaintiffs, sold to Ruhrgas AG, a German company, and other European buyers. Sales of the gas are governed by the

Heimdal Gas Sales Agreement dated March 2, 1984 between MPCN, as seller, and Ruhrgas AG and the other European buyers, and an amendment thereto dated May 11, 1990 (collectively, the "Agreement") attached to the Notice of Removal as Ex. "B", Tab 1. All of the Heimdal Field gas purchased by Ruhrgas AG from MPCN is covered by the Agreement, which contains a Norwegian choice of law clause and an arbitration clause providing for arbitration in Stockholm, Sweden.

During the course of the contractual relationship between MPCN and the buyers under the Agreement, a number of issues relating to the Agreement and in particular to the price of gas arose and were the subject of disputes and negotiations which were conducted primarily in Europe. One such dispute led to an arbitration filed by MPCN with the International Court of Arbitration of the International Chamber of Commerce in 1987. That arbitration resulted in an award in September of 1989, which the buyers challenged in court in Stockholm, Sweden. While those proceedings were pending, negotiations ensued to resolve the disputes, the result of which was the amendment to the Heimdal Gas Sales Agreement, executed in Germany on May 11, 1990, and the withdrawal of the proceedings challenging the arbitration award. Subsequently, further disputes relating to the Agreement developed between MPCN and the buyers, which were the subject of further negotiation between MPCN and the buyers until the filing of this litigation.

II.

SUMMARY OF PLAINTIFFS' PETITION

In their First Amended Petition, Plaintiffs allege that Ruhrgas AG is liable under the following theories:

- (1) fraud,
- (2) tortious interference with prospective business relationships,
- (3) participation in breach of fiduciary duty,
- (4) constructive fraud, and
- (5) civil conspiracy.

First Amended Petition ¶¶ 36-63. Curiously, Plaintiffs allege that Den Norske Stats Oljeselskap A.S. ("Statoil"), a Norwegian state-owned company, has engaged in "Wrongful acts and conspirational activities," "negligently misrepresented or fraudulently represented" facts, committed "breaches of fiduciary duties," and engaged in a civil conspiracy with Ruhrgas AG, First Amended Petition ¶¶ 31, 33, 52, 60, 61, yet Plaintiffs have not sued Statoil in this lawsuit.

III.

SUMMARY OF ARGUMENT

This memorandum establishes that this case against Ruhrgas AG must be dismissed pursuant to Fed. R. Civ. P. 12(b)(2), and subject to the court's ruling on personal jurisdiction and without waiving same, dismissed or service of process quashed pursuant to Fed. R. Civ. P. 12(b)(4) and 12(b)(5).

First, the Court does not have personal jurisdiction (specific or general) over Ruhrgas AG, a German corporation. Specific jurisdiction is absent because virtually all of the alleged conduct of Ruhrgas AG relating to this European dispute occurred outside of Texas. General jurisdiction is absent because Ruhrgas AG does not have regular, systematic, or continuous contacts with Texas. In addition, the Court's exercise of personal jurisdiction over Ruhrgas AG would offend traditional notions of fair play and substantial justice. *See infra*, Section IV.

Second, subject to the Court's ruling on personal jurisdiction, the case should be dismissed for insufficiency of service of process or, alternatively, service of process should be quashed. Plaintiffs have improperly served Ruhrgas AG in two respects because of their failure to comply with the Hague Service Convention. First, Plaintiffs attempted to serve Ruhrgas AG through the Texas Secretary of State. Germany has specifically exercised its right under the Hague Convention to require all service of process to be sent to the proper German central authority. Second, Plaintiffs failed to have either the Original or First Amended Petition translated into German as required by the Hague Service Convention. *See infra*, Section V.

IV.

EXERCISING PERSONAL JURISDICTION OVER RUHRGAS AG WOULD VIOLATE THE DUE PROCESS CLAUSE

As a threshold issue, the Court must examine whether the exercise of personal jurisdiction over

Ruhrgas AG accords with the Due Process Clause of the Fourteenth Amendment. *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1361 (5th Cir. 1990); *Villar v. Crowley Maritime Corp.*, 780 F. Supp. 1467, 1474-75 (S.D. Tex. 1992), *aff'd*, 990 F.2d 1489 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 690 (1994). The determination of whether due process has been satisfied entails a two-pronged inquiry. *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1068 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 193 (1992). First, the nonresident defendant must have some "minimum contacts" with the forum state resulting from an affirmative act or acts on its part. *Id.* Second, the exercise of personal jurisdiction over the nonresident defendant must comport with traditional notions of fair play and substantial justice. *Id.* Consistent with the concept of due process, courts may exercise either general or specific personal jurisdiction over nonresident defendants. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984); *Beary v. Beech Aircraft Corp.*, 818 F.2d 370, 375-76 (5th Cir. 1987). However, a unanimous United States Supreme Court has cautioned against the exercise of personal jurisdiction in cases such as this:

The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.

Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987).

A. Ruhrgas AG Does Not Have Sufficient Minimum Contacts with Texas so as to Support the Exercise of Specific or General Personal Jurisdiction Over It.

Minimum contacts must result from a defendant's own activities directed toward the forum state. Restated, a defendant must "purposefully avail[] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *see also Asahi Metal*, 480 U.S. at 109; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). When the activities of a nonresident defendant in a forum are isolated or disjointed, jurisdiction is proper only if the cause of action arises from a particular activity of the defendant within the forum. In these instances, jurisdiction is said to be specific. *Burger King Corp.*, 471 U.S. at 472; *Helicopteros Nacionales*, 466 U.S. at 414 n.8. In order for general jurisdiction to exist, the nonresident defendant's contacts with the forum state must be continuous and systematic. *Bullion v. Gillespie*, 895 F.2d 213, 216 (5th Cir. 1990). When a claim of general jurisdiction is alleged, a high level of contact with the forum state is required to support jurisdiction. *Dalton*, 897 F.2d at 1362. The following discussion establishes that neither specific nor general jurisdiction over Ruhrgas AG exists in Texas.

1. Ruhrgas AG Has Not Submitted Itself to the Specific Jurisdiction of Texas Courts.

In order for specific jurisdiction to apply, the causes of action must arise from a particular activity of the nonresident defendant within the forum. *Burger King Corp.*, 471 U.S. at 472; *Helicopteros Nacionales*, 466 U.S. at 414 n.8. Thus, specific jurisdiction is premised on contacts with the forum that are related to the particular controversy. Crucial to the specific jurisdiction analysis is the relationship among the defendant, the forum, and the litigation. *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772 (5th Cir. 1988). Moreover, the nonresident defendant's conduct within the forum must be such that he should reasonably anticipate being haled into court there. *World-Wide Volkswagen*, 444 U.S. at 297. No defendant should be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts. *Burger King Corp.*, 471 U.S. at 486.

The nonresident defendant must purposefully avail himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws. *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 777 (5th Cir. 1986), *cert. denied*, 481 U.S. 1015 (1987). In the determination of whether a foreign corporation should be required to defend itself in a suit in Texas arising out of a contract between it and a Texas corporation, each case must be decided on its own facts. *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1028 (5th Cir. 1983), *cert. denied*, 466 U.S. 962 (1984). Considerations such as the quality, nature, and extent of the activity in the forum, the foreseeability of consequences within the

forum from activities outside it, and the relationship between the cause of action and the contacts, are important in determining whether the nonresident defendant's actions constitute "purposeful availment." *Hydrokinetics*, 700 F.2d at 1028.

The causes of action asserted herein are based on an agreement for the sale and delivery of natural gas from a field in the Norwegian North Sea to numerous European buyers. Hoffmann Affidavit ¶ 3 (Ex. "B")¹ The Agreement was executed in Europe, is governed by Norwegian law, is to be performed in Europe, and contains an arbitration clause providing for arbitration in Stockholm, Sweden. *Id.* ¶¶ 4, 6 & 9. The Agreement provides for the purchase and sale of gas to Ruhrgas AG in Europe and all payments under the Agreement have been to MPCN to accounts in London, England and New York. *Id.* ¶ 4. None of these payments were made to accounts in Texas. *Id.*

Over the course of years, dozens of meetings between representatives of MPCN, Ruhrgas AG and the other buyers relating to the Agreement have taken place. Hoffmann Affidavit ¶ 8 (Ex. "B"). Only three of these meetings were held in Houston, Texas rather than Europe and these meetings also dealt with the Agreement. *Id.*

The first meeting in Houston occurred on February 20, 1987. *Id.* That meeting was between MPCN and the

¹ The originals of each referenced Affidavit are attached to Ruhrgas AG's Motion to Dismiss Under Fed. R. Civ. P. 12(b)(2), (4) and (5). Copies of the referenced Affidavits are also attached here for convenient reference.

group of buyers under the Agreement, including Ruhrgas AG. The subject of that meeting was a dispute relating to the Agreement that had arisen between MPCN and the group of buyers, including Ruhrgas AG. *Id.* As the dispute was not resolved in this meeting, MPCN initiated arbitration against Ruhrgas AG and the other buyers in accordance with the arbitration provisions of the Agreement. *Id.*

On November 28, 1989, Ruhrgas AG and the other buyers under the Agreement attended a second meeting in Houston. *Id.* The subject of this meeting was the negotiation of an overall settlement agreement on the pending contractual issues including new price provisions for gas to be delivered under the Agreement. *Id.* A third meeting occurred in Houston on April 24-25, 1990. *Id.* The subject of the third meeting was the same as the second and led to the amendment dated May 11, 1990. *Id.* The amendment was not signed in Texas; rather, it was signed in Essen, Germany. *Id.* No other meetings in Texas have occurred since April 1990. *Id.*

Plaintiffs suggest that specific jurisdiction may be sustained over Ruhrgas AG because it allegedly has done business in Texas within the meaning of the Texas long-arm statute. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042; First Amended Petition ¶ 4. The Texas long-arm statute extends personal jurisdiction to nonresidents when the action arises from the nonresidents' business in the state, and doing business includes committing a tort in Texas. *Id.* Plaintiffs allege fraud, tortious interference with prospective business relationships, breach of fiduciary duty, constructive fraud, and civil conspiracy. First Amended Petition ¶¶ 36-63. These allegations arise from and relate

to the Agreement between Ruhrgas AG, the other buyers, and MPCN. Hoffmann Affidavit ¶¶ 3,7 & 8. (Ex. 111311).

In *Jones*, *Southmark*, and *Hydrokinetics*, under similar facts, the Fifth Circuit found insufficient contact to sustain specific jurisdiction.

- a. *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061 (5th Cir. 1992), cert. denied, 113 S. Ct. 193 (1992).

In *Jones*, a widow brought a tort claim pursuant to the Texas long-arm statute against Geosource, her late husband's employer. Geosource filed a third-party complaint against Total Exploration for contractual indemnity and contribution. Total Exploration was a French corporation for whom Geosource was performing subcontracting work. Total Exploration moved for dismissal based on lack of personal jurisdiction. *Id.* at 1063. The plaintiff alleged that her husband, a Texas resident, was murdered by anti-government rebels while employed by Geosource in Sudan. The plaintiffs cause of action was based on the defendants' negligent failure to warn her husband, Jones, of the danger of attack by rebels. Geosource sent Jones to Sudan to perform under a contract between Geosource and Total Exploration. The contract was negotiated primarily by telephone and telex between Geosource's United Kingdom office and Total Exploration's Paris office. However, several of the communications originated from Geosource's Houston office, although no face-to-face negotiations were conducted in Texas. The plaintiff alleged the following facts sufficiently tied Total

Exploration to Texas: (1) Geosource was required to purchase materials from Total Exploration, and Total Exploration knew the funds would originate from Texas; (2) a portion of Geosource's performance occurred in Texas, i.e., employment of Texas residents, payment for equipment purchases, and arrangement of work schedules; and (3) Geosource was required to maintain insurance, which was foreseeably obtained in Texas. *Id.* at 1068-69. The Fifth Circuit rejected this conduct as a basis for personal jurisdiction, and held that Total Exploration was not subject to specific jurisdiction. The factors that the Court deemed determinative in *Jones* require dismissal in this case:

- The contract between Geosource and Total Exploration was not executed in Texas. *Id.* at 1067.
- Similarly, the Agreement in this case was executed in Europe, not in Texas. Hoffmann Affidavit ¶ 4 (Ex. "B").
- The Geosource contract contained a choice of law clause requiring arbitration under English law. Thus, the circumstances surrounding the negotiation and formation of the contract indicated "rather forcefully that Total Exploration did not purposefully direct its activities toward Texas." *Id.* at 1069.
- The Agreement stipulated that Norwegian law governs the Agreement, and provided for the resolution of all disputes by arbitration in Sweden. Hoffmann Affidavit ¶¶ 5, 6 & 9 (Ex. "B").

- Total Exploration negotiated with Geosource for exploration work in Sudan, and Geosource's Texas office is a "mere fortuity." M. at 1069.
- *Ruhrgas AG negotiated with MPCN almost exclusively in Europe. At the time the parties entered into the Agreement, MPCN's principal place of business was in Ohio and it only later moved its offices to Texas. See Heimdal Gas Saks Agreement dated March 2, 1984, attached to the Notice of Removal as Ex. "B," Tab 1, and letter from MPCN as Ex. "B," Tab 9. The fact that MPCN has a Texas office is a "mere fortuity."*

The *Jones* rationale makes apparent that Ruhrgas AG, under similar facts, did not avail itself to the jurisdiction of Texas.

b. *Southmark Corp. v. Life Investors, Inc.*,
851 F.2d 763 (5th Cir. 1988).

In *Southmark*, a prospective stock purchaser brought suit against the seller of stock and the stock's ultimate purchaser alleging breach of contract and tortious interference with business relations. Southmark, the plaintiff, alleged that it contractually agreed with Life to purchase stock. Subsequently, Life sold the stock to USLICO. Southmark contended that USLICO tortiously interfered with its contract and business relations with Life. Southmark was incorporated in Georgia with its principle place of business in Texas. USLICO was a Virginia company. The plaintiff alleged that the district court had specific

jurisdiction over USLICO because there was evidence that USLICO committed an intentional tort against Southmark in Texas. The district court held that USLICO's contacts with Texas were insufficient to establish specific jurisdiction, and the Fifth Circuit affirmed. *Id.* at 764. The Fifth Circuit based its finding of no specific jurisdiction on the following factors:

- USLICO did not expressly aim its allegedly tortious activities at Texas, nor was Texas the focal point of USLICO's allegedly tortious conduct. *Id.* at 772.
- *Ruhrgas AG never expressly aimed any of its alleged tortious activities at Texas, nor was Texas the focal point of any of Ruhrgas AGs activities under the Agreement.* Hoffmann Affidavit ¶ 4 (Ex. "B").
- There was no evidence that the sale of stock contract between Life and Southmark was made or to be performed in Texas. *Id.*
- *The Agreement from which the tortious allegations arise was not executed in Texas. Further, the Agreement provides for no performance in Texas and contains no reference to Texas. The Agreement was executed in Europe and was to be performed in Europe.* Hoffmann Affidavit ¶ 4 (Ex. "B").
- There was no evidence that the alleged contract between Southmark and Life was to be governed by Texas law. *Id.*
- *Ruhrgas AG had no intention that the Agreement or any actions arising from the Agreement were to be governed by Texas law. The Agreement contained a specific*

choice of law provision indicating that Norwegian law would resolve all conflicts. Moreover, the Agreement provides that disputes would be subject to arbitration in Stockholm, Sweden. Hoffmann Affidavit ¶¶ 5, 6 & 9 (Ex. "B").

- USLICO was not a Texas corporation and did not do any business in Texas. *Id.* at 773.
- *Ruhrgas AG does not have a place of business in Texas. Ruhrgas AG is neither chartered nor licensed to do business in Texas. Ruhrgas AG has never performed any natural gas operations in Texas or sold any product that reached Texas. Ruhrgas AG has not bought or sold gas in Texas or elsewhere in the United States. Eckert Affidavit ¶¶ 4 & 16 (Ex. "A").*
- The stock subject to the alleged contract was not located in Texas or to be purchased in Texas. *Id.*
- *Ruhrgas AG is engaged in the business of providing natural gas to the European market. Eckert Affidavit ¶ 3 (Ex. "A"). The Agreement provides for the purchase and sale of gas to Ruhrgas AG in Europe. Hoffmann Affidavit ¶ 4 (Ex. "B").*
- Southmark itself was incorporated in Georgia. The fact that Southmark had its principal place of business in Texas was a "mere fortuity." The fact that Southmark was a Texas resident for jurisdictional purposes stemming from its principal place of business in Texas would not cause USLICO to anticipate

being haled into a Texas court to answer for its conduct. *Id.*

- *MPCN is incorporated in Delaware. When the Agreement was executed, MPCN's principal place of business was in Ohio. Agreement attached to Notice of Removal at Ex. "B," Tab 1. It is by "mere fortuity" that MPCN moved its principal place of business to Texas. See Ex. "B," Tab 9 to Notice of Removal.*

Like USLICO, Ruhrgas AG does not have sufficient minimum contacts to establish specific jurisdiction.

- c. *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026 (5th Cir. 1983), cert. denied, 466 U.S. 962 (1984).

In *Hydrokinetics*, a Texas corporation brought a breach of contract claim in federal district court against Alaska Mechanical, Inc., an Alaskan corporation. Hydrokinetics, the plaintiff, contracted with Alaska Mechanical to manufacture goods for Alaska Mechanical's construction business. Hydrokinetics alleged the following Texas contacts: (1) Alaska Mechanical agreed to purchase goods to be manufactured in Texas; (2) payment was made in Texas; (3) prior to executing the contract, the parties engaged in extensive communications originating in Texas and Alaska; (4) Alaska Mechanical officers traveled to Texas to finalize the agreement; and (5) the contract was formally created in Texas. *Id.* at 1028-29. The Fifth Circuit held that these contacts were not sufficient to establish specific jurisdiction. The Court reviewed the

"totality of the facts" to conclude that the necessary purposeful availment was not present. *Id.* at 1029. The Court found the following facts persuasive:

- Alaska Mechanical did not regularly engage in business in Texas. Its sole contact with Texas was the single, isolated transaction involved in this case. *Id.* at 1029.
- *Ruhrgas AG does not regularly engage in business in Texas.* Eckert Affidavit ¶¶ 4-14 (Ex. "A").
- The agreement between Hydrokinetics and Alaska Mechanical included a choice of law provision expressly providing that it was to be governed according to Alaska law. *Id.*
- *The Agreement contained a choice of law provision expressly providing that any disputes would be resolved according to Norwegian law and by arbitration in Sweden.* Hoffmann Affidavit ¶¶ 5, 6 & 9 (Ex. "B").
- No performance under the contract by Alaska Mechanical was to take place in Texas, other than payment for the goods. *Id.*
- *No performance under the Agreement was to take place in Texas. Moreover, Ruhrgas AG made no payments in Texas.* Hoffmann Affidavit ¶ 4 (Ex. "B").
- The fact that Alaska Mechanical officials traveled to Texas to inspect Hydrokinetic's facilities and to resolve disputes between the parties is relevant, but it is not "sufficient to alter the basic quality of the nature of Alaska Mechanical's contact with the state of Texas." *Id.*

- *Ruhrgas AG attended three meetings in Texas, as compared to dozens in Europe, to resolve issues related to the Agreement.* Hoffmann Affidavit ¶ 8 (Ex. "B").

In determining specific jurisdiction where a cause of action arises from a contract, the Fifth Circuit has repeatedly held that the following factors are determinative: a choice of law provision, the place of performance or place where the contract is executed, and the "mere fortuity" that a principal place of business exists in the forum state. *See Jones*, 954 F.2d at 1069; *Southmark*, 851 F.2d at 773; *Holt*, 801 F.2d at 778; *Hydrokinetics*, 700 F.2d at 1029 (choice of law provision determinative). In this case, the Agreement contains a choice of law provision that it will be governed and construed in accordance with Norwegian law. Moreover, the Agreement contains a binding arbitration clause mandating that all disputes arising under the Agreement be resolved by arbitration in Sweden. Thus, Ruhrgas AG never anticipated being subject to any American court, and certainly not Texas courts. The only Texas connection under the Agreement results from MPCN moving its offices to Texas in 1986, a "mere fortuity." Applying the factors utilized by the Fifth Circuit, there is no basis on which this Court can exercise specific jurisdiction over Ruhrgas AG.

2. Ruhrgas AG has not Submitted Itself to the General Jurisdiction of Texas Courts.

Under the facts described in the Affidavits of Eckert (Ex. "A"), von Falkenhausen (Ex. "C"), Benke (Ex. "D") and Plambeck (Ex. "E") and the holdings in *Helicopteros Nacionales* and *Bearry*, Ruhrgas AG has not submitted

itself to the general jurisdiction of the courts sitting in Texas.

a. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984)

In *Helicopteros Nacionales*, a Colombian helicopter chartering company ("Helicol") was sued in a Harris County District Court. The wrongful death claim arose from the crash of a helicopter in Peru with American citizens aboard. *Id.* at 409-10. The Supreme Court of Texas held that Helicol's contacts with Texas were sufficient to allow the court to assert personal jurisdiction. *Id.* at 409. The United States Supreme Court disagreed and reversed. The United States Supreme Court identified the following contacts of Helicol with Texas: (1) negotiating sessions in Houston for various contracts, (2) purchasing helicopters, spare parts, and accessories from Bell Helicopter Company in Fort Worth over the course of seven years for a total of more than \$4 million, (3) sending pilots to Bell Helicopter in Fort Worth for training and ferrying helicopters from Fort Worth to South America, (4) sending management and maintenance personnel to visit Bell Helicopters in Fort Worth to receive "plant familiarization" and for technical consultation, and (5) receiving money into its bank accounts from checks drawn on Texas banks. *Id.* at 411. The United States Supreme Court expressly found that these contacts were not sufficient to satisfy the requirement of the due process clause of the Fourteenth Amendment and reversed the judgment of the Texas Supreme Court. *Id.* at 418-19.

The conclusion reached by the United States Supreme Court in *Helicopteros Nacionales* is also compelled in this case. The cases are parallel:

- Helicol never had been authorized to do business in Texas and never had an agent for service of process in Texas. *Id.* at 411;
- *Ruhrgas AG never has been authorized to do business in Texas and never has had an agent for service of process in Texas.* Eckert Affidavit ¶ 4 (Ex. "A").
- Helicol never performed helicopter operations in Texas or sold any product that reached Texas. *Id.*;
- *Ruhrgas AG never performed natural gas operations in Texas or sold any product that reached Texas.* Eckert Affidavit ¶ 16 (Ex. "A").
- Helicol never owned real or personal property in Texas and never maintained an office or establishment in Texas. *Id.*;
- *Ruhrgas AG never has owned real or personal property in Texas and never maintained an office or establishment in Texas.* Eckert Affidavit ¶¶ 7 & 8 (Ex. "A").
- Helicol did not maintain records in Texas and had no shareholders in Texas. *Id.*;
- *Ruhrgas AG has not maintained records in Texas and has no shareholders in Texas.* Eckert Affidavit ¶¶ 8 & 12 (Ex. "A").
- In Helicol, the United States Supreme Court held "Helicol's contacts with the State of

Texas were insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment." *Id.* at 418-19.

- *In this case, Ruhrgas AG's contacts with the State of Texas are insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment.*

Moreover, although Ruhrgas AG has sent personnel to Houston for training as described in the Affidavit of Mr. Von Falkenhausen (Ex. "C"), the Supreme Court also addressed the same issue in *Helicopteros Nacionales* and dismissed the significance of such contacts with the following holding:

[W]e hold that mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over nonresident corporation in a cause of action not related to those purchase transactions. *Nor can we conclude that the fact that Helicol sent personnel into Texas for training in connection with the purchase of the helicopters and equipment in that State in any way enhanced the nature of Helicol's contacts with Texas.*

Helicopteros Nacionales, 466 U.S. at 418 (emphasis added).

In sum, just as the *Helicopteros Nacionales* court found that Helicol could not be sued in Texas under general jurisdiction principles, Ruhrgas AG cannot be sued in Texas under those principles.

b. *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987)

In *Bearry*, Beech Aircraft Corporation ("Beech"), the defendant, was a Delaware corporation with its principal place of business in Kansas. Beech had no telephone listing, warehouse, manufacturing facility, or bank account in Texas. Beech did not insure any person, own any real estate, pay any taxes, or permanently assign employees or directors to work in Texas. *Id.* at 372. Over a five-year period, Beech employed over three hundred marketing employees at its Kansas office in a nationwide marketing campaign. During this period, there were sales of nearly \$250 million to seventeen Texas dealers. *Id.* One of those dealers was a wholly-owned subsidiary of Beech. In fact, Beech manufactured air frame assemblies for Bell Helicopters in Fort Worth, "under contracts exceeding \$72 million." *Id.* at 373. Beech representatives even "visited the Texas dealers on occasion to assist them with maintenance problems, to demonstrate new aircraft, and to offer sales incentives to the Texas dealers, but only at a dealer's request." *Id.* Under these facts, the Fifth Circuit found that Beech's contacts with Texas were not the "continuous and systematic contacts on which general jurisdiction could be based." *Id.* at 375. Accordingly, the Fifth Circuit held that Beech was not subject to the jurisdiction of the courts sitting in Texas. *Id.* at 377.

As in *Bearry*, Ruhrgas AG does not have continuous and systematic contacts with Texas. The Eckert Affidavit (Ex. "A") establishes the following:

- (1) Ruhrgas AG is not organized under Texas law. It is a German corporation and its

principal place of business is in Essen, Germany (¶ 2);

- (2) Ruhrgas AG does not have a place of business in Texas and has never been licensed or chartered to do business in Texas (¶ 4);
- (3) Ruhrgas AG does not possess any type of license or business certificate issued by any government entity or political subdivision of Texas (¶ 6);
- (4) Ruhrgas AG does not maintain an office, manufacturing plant, or facility in Texas (¶ 7);
- (5) Ruhrgas AG does not own any real estate, bank accounts, financial instruments, or other physical assets in Texas (¶ 8);
- (6) Ruhrgas AG has no agents, sales representatives, directors, officers or shareholders who are employed, regularly assigned to work, or reside within Texas (¶ 12);
- (7) Ruhrgas AG does not have telephone listings or 1-800 telephone lines in Texas (¶ 9);
- (8) Ruhrgas AG does not advertise its services in Texas publications (¶¶ 10 & 11);
- (9) Ruhrgas AG has never filed suit in Texas, petitioned any governmental agency, or otherwise purposely availed itself of the privilege of conducting business in Texas, other than the actions taken in this suit (¶ 15);
- (10) Ruhrgas AG has not maintained continuous or systematic contacts with Texas (¶ 5).

- (11) Unlike Beech, the natural gas provided by Ruhrgas AG is not used in Texas – it is used in Europe (¶¶ 3, 16).

Ruhrgas AG's contacts with Texas have not been sufficiently continuous and systematic to constitute acquiescence to the general jurisdiction of the courts in Texas. Like Beech, Ruhrgas AG is not subject to suit in any Texas court.

Plaintiffs' First Amended Petition suggest that personal jurisdiction can be sustained over Ruhrgas AG because it allegedly "owns a 20% interest in Texas-based Tenneco Oil Company." First Amended Petition ¶ 4. Plaintiffs are factually and legally incorrect. Ruhrgas does not own 20% of Tenneco Oil Company; rather, it owns 20% of the stock of Tenneco Energy Resources Corporation ("TERC"). Benke Affidavit ¶ 3 (Ex. "D"). Further, as shown below, Ruhrgas AG's involvement with TERC does not constitute continuous and systematic contacts with Texas as are necessary to confer general jurisdiction.

Ruhrgas has sent some of its young, low-level employees for short periods of time to work in Texas for TERC. von Falkenhausen Affidavit ¶ 4 (Ex. "C"). While on assignment to TERC, the trainee-employees work under the direction, supervision, and control of TERC management and are bound by TERC's instructions in the performance of their work. *Id.* While on the training assignment at TERC, the trainee-employees are not acting or representing Ruhrgas AG. *Id.*

Ruhrgas has one voting member on the board of directors of TERC. Benke Affidavit ¶ 3 (Ex. "D"). However, he does not have any executive powers. *Id.* He

periodically travels between Germany and Houston. *Id.* Other than Ruhrgas AG's investment in TERC and the arrangement for the training of Ruhrgas AG employees by assignment to TERC, Ruhrgas AG and TERC have no contracts or other business dealing with one another. *Id.*

The Supreme Court's holding in *Helicopteros Nacionales*, discussed *supra*, requires rejection of any general jurisdiction argument based on the training of personnel through TERC, the visits to Houston of Ruhrgas AG single board member on the TERC board, or the participation of an executive of Ruhrgas AG on the European Advisory Council of Tenneco, Inc. See Plambeck Affidavit (Ex. "E"). Moreover, Ruhrgas AG's investment in TERC, the arrangement for the training of Ruhrgas AG employees by assignment to TERC, and the participation on the European Advisory Council of Tenneco, Inc. are unrelated to the causes of action Plaintiffs assert against Ruhrgas AG in this action. Eckert Affidavit ¶ 18 (Ex. "A").

Neither does Ruhrgas AG's investment in TERC create general jurisdiction. Plaintiff's argument was rejected by the court in *Construction Aggregates, Inc. v. Senior Commodity Co.*, 860 F. Supp. 1176 (E.D. Tex. 1994), *aff'd*, 48 F.3d 531 (5th Cir. 1995). In *Construction Aggregates*, plaintiff argued that the court had general jurisdiction over the defendant because of his investment in a motel located in Texas. *Id.* at 1179. The defendant was a limited partner in the hotel and possessed a right to 10% of any profits from the partnership and had inspected the property on one occasion. *Id.* The court held that "its strains reason to infer that anyone buying a limited partnership

interest as a passive investment in a Texas limited partnership impliedly consents to or expects to be haled into court on any and all suits brought in Texas." *Id.* at 1180. The court relied on the Supreme Court's holding in *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977), which noted that it strains reason to suggest that anyone buying securities in a corporation impliedly consented to any and all suits brought in the company's state of incorporation. This same analysis applies here and requires rejection of any contention that Ruhrgas AG's investment in TERC confers the Texas courts with general jurisdiction over Ruhrgas AG.

B. Exercising Personal Jurisdiction over Ruhrgas AG Would Offend Traditional Notions of Fair Play and Substantial Justice.

Even assuming Ruhrgas AG had minimum contacts with Texas, the Court cannot exercise jurisdiction over it if it would offend traditional notions of fair play and substantial justice. *International Shoe*, 326 U.S. at 316; *Villar*, 780 F. Supp. at 1475. The determination of whether exercising jurisdiction over a nonresident defendant offends traditional notions of fair play and substantial justice depends on several factors. The principal factors are as follows:

- (1) the burden on the defendant;
- (2) the forum state's interest in the dispute;
- (3) the plaintiffs interest in obtaining relief;
- (4) the most efficient judicial resolution of the controversy; and

- (5) the interest of the several states in furthering social policies.

Villar, 780 F. Supp. at 1481 (citing *Asahi Metal*, 480 U.S. at 113); see also *World-Wide Volkswagen*, 444 U.S. at 292; *Brand v. Menlove Dodge*, 796 F.2d 1070, 1075 (9th Cir. 1986). Application of these factors to the facts of this case reveals that forcing Ruhrgas AG to defend itself in Texas would not be fair or reasonable.

1. The Burden on Ruhrgas AG is Great.

The burden on Ruhrgas AG, which is located in Germany, in having to defend itself in Texas, would be great. Hoffmann Affidavit ¶¶ 10-12 (Ex. "B"). Courts have recognized that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi Metal*, 480 U.S. at 114. The primary concern in determining whether an exercise of personal jurisdiction is reasonable is the burden on the defendant rather than the burden on the plaintiff. *Insurance Co. of No. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1272 (9th Cir. 1981) ("If the burdens of trial are too great for a plaintiff, the plaintiff can decide not to sue or, perhaps, to sue elsewhere. A defendant has no such luxury. The burdens on a defendant are of particular significance if, as here, the defendant has done little to reach out to the forum state."). It is "common knowledge" that it is inconvenient and burdensome for a corporation to defend any lawsuit away from its principal place of business. See *Davis v. Farmers' Co-op Equity*

Co., 262 U.S. 312, 315 (1923); *Bearry*, 818 F.2d at 377 (noting the "real" burden placed upon the defendant). The burden is even greater for a foreign corporation that has no offices in the United States and which must defend itself in a suit abroad. *Asahi Metal*, 480 U.S. at 114. In general jurisdiction cases like this, where the incident at issue had nothing to do with the forum, the burden on the European defendant is great.

2. Texas Has Little Interest In the Dispute.

Texas' interest in this litigation is slight. It is a dispute over an agreement among numerous European parties concerning natural gas from a Norwegian North Sea field. Hoffmann Affidavit ¶ 3 (Ex. "B"). The allegations of Plaintiffs' First Amended Petition reveal that the focus of this lawsuit is in Europe. The First Amended Petition alleges that "this case arises out of a conspiracy" among Ruhrgas AG and Statoil - "Norway's state owned oil and gas company" - and others "to monopolize the Western European market for natural gas." First Amended Petition ¶¶ 6, 9. Plaintiffs allege that Statoil, Ruhrgas AG and a consortium of European gas buyers "launched a plan to monopolize the Western European gas market." First Amended Petition ¶ 12. Furthermore, Ruhrgas AG is not a resident of Texas. Eckert Affidavit ¶ 2 (Ex. "B"). Moreover, resolution of this dispute against Ruhrgas AG in Texas will in no way further the Texas judicial system's interest in efficient dispute resolution or the interests of the several states. Simply put, "Texas has no 'special' interest in granting relief to its citizens against a foreign corporation on a cause of action that arose under the laws

of a foreign government for conduct outside the United States." *Jones*, 954 F.2d at 1070.

3. Plaintiffs Have No Recognizable Interest in Litigating This Action in Texas.

Plaintiffs do not have any recognizable constitutional interest in adjudicating this controversy against Ruhrgas AG in Texas. Most of the evidence in this case, including that from witnesses, is in foreign countries, not Texas. Hoffmann Affidavit ¶¶ 10 & 13 (Ex. "B"). Plaintiffs have no legitimate interest in resolving this dispute in Texas.

4. Texas is Not a Convenient Forum.

Texas is not the site for the most efficient judicial resolution of the controversy. Most of the witnesses and evidence are located outside of Texas. Hoffmann Affidavit ¶¶ 10 & 13 (Ex. "B"). Thus, not only would Ruhrgas AG be forced to travel great distances to defend this action in Texas, numerous documents and witnesses would have to be transported here from Europe. *Id.* ¶¶ 10, 13. It would be inefficient and burdensome to conduct discovery and a trial in Texas when many of the witnesses and evidence are far outside the state. *Id.* ¶¶ 10, 11 & 13. This dispute would be more efficiently resolved where the evidence and the witnesses are located. See *Brand v. Menlove Dodge*, 796 F.2d at 1075 ("The site where the events in question took place or where most of the evidence is located usually will be the most efficient forum.").

5. Europe has a Greater Interest in this Suit.

Finally, other forums have a much stronger interest in this dispute than Texas does. It is important to consider "the interests of the 'several States,' . . . in the efficient judicial resolution of the dispute and the advancement of substantive policies." *Asahi*, 480 U.S. at 115. The interests of other nations must also be considered. See *id.* at 115-16; *Guardian Royal Exchange Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 229 (Tex. 1991). For example, Norway has a direct interest in this litigation given the allegations that its state-owned oil company, Statoil, engaged in wrongful conduct. This directly implies allegations against the government of Norway itself. Norway also has a direct interest in this litigation given the fact that Norway's natural resources are the subject of the underlying transaction. Europe has a stronger interest than Texas regarding allegations of a "conspiracy . . . to monopolize the Western European market for natural gas." First Amended Petition ¶ 6. Europe has a strong interest in the reliability of natural gas agreements and the security of supply, which is one of the main concerns of the European Energy Policy. Clearly, the interests of Europe are more directly and substantially implicated than those of Texas.

As the court in *Bearry* concluded, "all states have an interest in predictability of jurisdiction, in a legal system that allows the citizens of those states to structure their transactions to limit their amenability to suits in foreign states." 818 F.2d at 377. Allowing jurisdiction over Ruhrgas AG in Texas in this case would subvert the interests of Germany, as well as the due process rights of

Ruhrgas AG. As the Fifth Circuit stated, "when the cause of action is unrelated to the nonresident's slight activity within the forum, . . . the constitutionality of jurisdiction is least likely." *Prejean v. Sonatrach*, 652 F.2d 1260, 1265 n.4 (5th Cir. Unit A Aug. 1981).

In sum, even if Plaintiffs can establish "minimum contacts" of Ruhrgas AG with Texas, the exercise of personal jurisdiction over it would not be fair or reasonable and would offend traditional notions of fair play and substantial justice. *Villar*, 780 F. Supp. at 1475.

V.

PLAINTIFFS' FAILURE TO PROPERLY SERVE RUHRGAS AG REQUIRES DISMISSAL

Pursuant to Rule 12(b)(4) and (b)(5) of the FEDERAL RULES OF CIVIL PROCEDURE, subject to and without waiver of its previously filed Motion to Dismiss for lack of personal jurisdiction, Ruhrgas AG has moved to dismiss the Plaintiffs' claims for failure to effect service of process or, alternatively, to quash service of process. When service of process is challenged, the party on whose behalf service is made has the burden of establishing its validity. *Familia de Boom v. Arosa Mercantil, SA.*, 629 F.2d 1134, 1139 (5th Cir. 1980), *cert. denied*, 451 U.S. 1008 (1981). Plaintiffs cannot meet this burden in two respects. First, Plaintiffs have failed to serve Ruhrgas AG through the proper German central authority as required by the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361,

T.I.A.S. No. 6638 (Nov. 15, 1965) ("Hague Service Convention") (Ex. "F"). Second, Plaintiffs have not served a version of their Original or First Amended Petition translated into German as required by the Hague Service Convention.

A. Plaintiffs Failed to Serve Ruhrgas AG through German Central Authority.

The Hague Service Convention requires each signatory country to establish a central authority to receive requests for service of judicial documents and proceedings in other countries and to serve such documents in a manner that is authorized by or consistent with local laws. *Volkswagenwerk AG v. Schlunk*, 486 U.S. 694, 698 (1988); Hague Service Convention, art. 5 (Ex. "F"). In *Volkswagenwerk AG v. Schlunk*, the Supreme Court endorsed the view that compliance with the Hague Service Convention is required when serving process in countries that are parties to the Convention:

By virtue of the Supremacy Clause, U.S. Const. Art. VI, the [Hague Service] Convention preempts inconsistent methods of service prescribed by state law in all cases to which it applies.

Volkswagenwerk, 486 U.S. at 699 (noting that the Hague Service Convention did not apply in that case because the defendant was a domestic corporation owned by a foreign corporation); *see also Vorhees v. Fischer & Krecke*, 697 F.2d 574, 575 n. 1 (4th Cir. 1983) ("The broad scope of the treaty is clearly stated. The convention is to apply 'in all cases, in civil or commercial matters, where there is

occasion to transmit a judicial or extrajudicial document for service abroad.' ") (citing Hague Service Convention, art. 1). Both Germany and the United States have ratified or acceded to the Convention. *Volkswagenwerk*, 486 U.S. at 698.

Article 10 of the Hague Service Convention enumerates alternative channels for the transmission of judicial documents without resort to the central authority. Specifically, article 10 of the Hague Convention permits the following:

Provided the State of destination does not object, the present Convention shall not interfere with -

- (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
- (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
- (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Hague Service Convention art. 10 (emphasis added) (Ex. "F"). Germany has expressly objected to service under article 10. Hague Service Convention n.10, at 43 (Ex. "F"); *Vorhees*, 697 F.2d at 575. Plaintiffs have not served Ruhrgas AG through the Hague Service Convention as they purport to do, *see* Original Petition and First

Amended Petition ¶ 4. Plaintiffs have attempted to serve Ruhrgas AG through the Texas Secretary of State. First Amended Petition ¶ 4. Because Germany has expressly objected to such service, Plaintiffs' service of process is ineffective.

B. Plaintiffs Have Failed to Serve a Copy of the Petition in German.

The Hague Service Convention provides that although the request shall be written in either English, French or the official language of the State in which the documents originate, the "Central Authority may require the document [to be served] to be written in, or translated into, the official language or one of the official languages of the State addressed." Hague Service Convention, art. 5.

Germany is one of the countries that has such a requirement. *Vorhees*, 697 F.2d at 575 (noting that served documents must be translated into German); *Lyman Steel Corp. v. Ferrostaal Metals Corp.*, 747 F. Supp. 389, 400 (N.D. Ohio 1990) ("West Germany also requires the translation of documents sought to be served for its nationals."). The German resolution enacting the Hague Convention states as follows: "Formal Service (paragraph 1 of Article 5 of the Convention) shall be permissible only if the document to be served is written in or translated into the German language." Annex to the Convention. Ex. "F" at 42; *Lyman Steel*, 747 F. Supp. at 400 n.14. Plaintiffs themselves expressly mention the requirement of translation in paragraph 4 of their Original Petition and First Amended Petition, but Plaintiffs have failed to comply with this requirement. Because Plaintiffs have not served

a translated copy of the Original Petition or the First Amended Petition, they have not complied with the Hague Service Convention. Therefore, service of process has not been properly effected upon Ruhrgas AG, and Plaintiffs' action should be dismissed, or, service of process should be quashed.

VI.

CONCLUSION

Plaintiffs' claims do not arise out of any contacts of Ruhrgas AG with Texas. Nor does Ruhrgas AG have systematic and continuous contacts with Texas. Further, the exercise of jurisdiction in this case would offend notions of fair play and substantial justice. The United States Supreme Court has clearly spoken:

Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.

Asahi Metal, 480 U.S. at 115. Plaintiffs' claims should be dismissed because the Court lacks personal jurisdiction over Ruhrgas AG.

Moreover, Plaintiffs have failed in two respects to serve Ruhrgas AG properly under the Hague Service Convention. Ruhrgas AG was not served through the proper German authority, and neither the Original Petition nor the First Amended Petition were translated into German.

For all the foregoing reasons, Ruhrgas AG respectfully requests that (1) the Court dismiss for lack of personal jurisdiction over Ruhrgas AG; and (2) subject to the

Court's ruling on personal jurisdiction and without waiving same, the Court dismiss Plaintiffs' claims pursuant to 12(b)(4) and (b)(5) or quash service on Ruhrgas AG.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on counsel of record for Plaintiffs by certified mail, return receipt requested this 28th day of August, 1995.

/s/ Ben H. Sheppard, Jr.
BEN H. SHEPPARD, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY,	§	
MARATHON INTERNATIONAL	§	
OIL COMPANY, and	§	CIVIL ACTION
MARATHON PETROLEUM	§	NO. H-95-4176
NORGE A/S,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	
	§	
RUHRGAS, A.G.,	§	
	§	
Defendant.	§	

PLAINTIFFS' MOTION TO REMAND

Pursuant to 28 U.S.C. § 1447(c), Marathon Oil Company ("Marathon"), Marathon International Oil Company, and Marathon Petroleum Norge A/S ("Norge"), collectively "Plaintiffs," respectfully urge this Court to remand this action to Texas state court for the following reasons.

1. Plaintiffs filed this action against Defendant Ruhrgas in Texas state court on July 6, 1995. Ruhrgas filed its notice of removal under 28 U.S.C. § 1446(a) on August 21, 1995, thereby removing the case to this Court. This motion to remand was filed within thirty days of Defendant's filing of its notice of removal.

2. Plaintiffs move the Court to remand the case to the 152nd Judicial District Court of Harris County, Texas (the court in which this action originally was filed)

because this Court lacks subject matter jurisdiction over the dispute.

3. This motion is based on the well-pleaded allegations of Plaintiffs' Original and First Amended Petitions; the Affidavits of Finn Engzelius, William F. Schwind, Jr. and John Evans (attached as Exhibit 1-3); the Brief filed in support of this motion; and other competent evidence on file in this matter.

4. Defendants have alleged three bases supporting their removal of this action: federal question jurisdiction under 28 U.S.C. § 1331, diversity jurisdiction under 28 U.S.C. § 1332, and the remand provisions under the Convention on the Recognition of Arbitral Awards, 9 U.S.C. § 201-08 (the "Convention"). None of these statutory provisions apply to the facts of this case.

5. Plaintiffs have not stated any federal claims in their Original or First Amended Petitions. To the contrary, Plaintiffs' Petition relies exclusively on (state) common law claims of fraud, tortious interference, participation in breach of fiduciary duty, constructive fraud, and civil conspiracy.

6. Plaintiffs have not sued a foreign state; thus the Foreign Sovereign Immunities Act (*see* 28 U.S.C. § 1441(d)) has no application. Ruhrgas is a private German corporation that is not state owned or controlled. Ruhrgas has not attempted to join as a party any foreign sovereign, and even if it did, the option to remove a portion of the case would belong to the sovereign alone, not to Ruhrgas. There is no federal common law right of removal for actions involving foreign corporations, and there is no federal removal statute that permits removal

simply because some of the facts relate to a foreign sovereign – especially when that sovereign is not even a party to the lawsuit.

7. There is no diversity of citizenship jurisdiction in this case; both Defendant Ruhrgas and Plaintiff Norge are aliens. Norge is the holder of a license to produce gas in the Heimdal gas field, has enforceable rights under applicable law, and is entitled to protect the value of its license and its portion of the unsold gas remaining in the field. Norge's interest in the Heimdal gas field has been damaged by Ruhrgas' actions, and accordingly, Norge has much more than a mere "possibility of recovery" in this case. Clearly, Norge is a proper plaintiff.

8. The Convention on Recognition and Enforcement of Foreign Arbitral Awards has no application here because this action does not seek to enforce a foreign arbitration award, nor does it primarily center on the interpretation of a foreign arbitration agreement. To the contrary, none of the Plaintiffs are parties to any sort of agreement (arbitration or otherwise) with Defendant, which Ruhrgas concedes in the Declarations filed in support of its notice of removal. For this reason alone, the Convention has no application to this action. Furthermore, none of the Plaintiffs have ever consented to arbitrate the claims at issue in this case, nor have they waived their U.S. and Texas constitutional rights to seek redress in the courts. The arbitration provision to which Ruhrgas often refers is strictly between Ruhrgas and Marathon Petroleum Company (Norway) ("MPCN"), which is a separate and distinct corporation from the Plaintiffs. Although a Marathon affiliate, MPCN is *not* a party to this case, is not seeking any relief in this action, and has

never purported to bind Plaintiffs to any arbitration agreement.

9. As is more fully set forth in the Brief filed in support of this Motion, none of Defendant's bases for removal have any support in law or fact. Accordingly, pursuant to 28 U.S.C. § 1447(c), Plaintiffs request that the case be remanded and that the Court award them their costs and expenses (including attorneys' fees) incurred as a result of Defendant's removal.

WHEREFORE, Plaintiffs respectfully urge the Court to remand this cause to the state forum from which it was removed, to award Plaintiffs their costs and expenses, and to grant them any other relief to which they are entitled.

Respectfully submitted,

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w/permission by GT
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CERTIFICATE OF CONFERENCE

Counsel for Plaintiffs has conferred with Defendant's counsel regarding the substance of this motion. No agreement could be reached regarding the motion's disposition, so the matter is presented to the Court for determination.

/s/

CERTIFICATE OF SERVICE

A copy of this document was served on Defendant's attorneys of record in accordance with Federal Rule of Civil Procedure 5, on September 14, 1995.

/s/

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

MARATHON OIL COMPANY,)	
MARATHON INTERNATIONAL)	
OIL COMPANY, and	)	CIVIL ACTION
MARATHON PETROLEUM	)	NO. H-95-4176
NORGE A/S)	
)	
Plaintiffs,)	
)	
v.)	
RUHRGAS, A.G.,)	
)	
Defendant.)	

**PLAINTIFF'S BRIEF IN SUPPORT OF
THEIR MOTION TO REMAND**

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OIL COMPANY, AND
MARATHON PETROLEUM
NORGE A/S

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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

MARATHON OIL COMPANY,)	
MARATHON INTERNATIONAL)	
OIL COMPANY, and	)	CIVIL ACTION
MARATHON PETROLEUM	)	NO. H-95-4176
NORGE A/S)	
)	
Plaintiffs,)	
)	
v.)	
)	
RUHRGAS, A.G.,)	
)	
Defendant.)	

**PLAINTIFF'S BRIEF IN SUPPORT OF
THEIR MOTION TO REMAND**

Plaintiffs Marathon Oil Company ("Marathon"), Marathon International Oil Company ("MIOC") and Marathon Petroleum Norge A/S ("Norge") submit the following brief in support of their motion to remand this action to Texas state court.

SUMMARY OF ARGUMENT

Defendant Ruhrgas, A.G. ("Ruhrgas"), a private German gas company, improvidently removed this case to federal court. This Court lacks subject matter jurisdiction over the action and should remand the case to the Texas state forum originally chosen by the Plaintiffs.

In an effort to make this case appear to be removable, Ruhrgas has blatantly mischaracterized the nature of the action. First of all, this case is *not* an attempt to recover tort damages "arising out of an agreement" between Ruhrgas and Marathon Petroleum Company (Norway) ("MPCN"). To the contrary, MPCN, although a Marathon affiliate, *is not a party to this case and is not seeking damages in this action*. None of the causes of action alleged in this case are based on Ruhrgas' contract with MPCN. Instead, this case is about (1) Ruhrgas' fraud in inducing Marathon and MIOC to finance the Heimdal gas field's development, and (2) Norge's attempt to recover the lost value of its license to produce Heimdal gas to the extent that loss was due to Ruhrgas' interference and other wrongful conduct.

Second, none of the Plaintiffs are parties to any sort of arbitration agreement with Ruhrgas, and none have ever consented to arbitrate any of the claims at issue in this action. The arbitration provision to which Ruhrgas constantly refers is contained in its agreement with MPCN. The terms of that unrelated arbitration provision expressly apply, as one would expect, *only* to the parties to that contract – none of whom are plaintiffs in this case. Ruhrgas concedes, as it must, that it has no agreements (arbitration or otherwise) with any of the Plaintiffs. The

damages being sought by the Plaintiffs here do not flow from the fact that MPCN is a Marathon affiliate; instead, Plaintiffs' damages flow entirely from Ruhrgas' own wrongful actions directed towards them. All of Plaintiffs' claims still would exist even if MPCN had never entered a contract with Ruhrgas.

Given that both Norge and Ruhrgas are subjects of foreign states under the rules governing diversity jurisdiction, there is not complete diversity in this case. Contrary to Ruhrgas' desperate and bold assertion, Norge has not been "fraudulently joined." Norge holds a license to produce gas in the Heimdal field and plainly has an interest in the subject matter of this case sufficient to satisfy any standard governing proper joinder.

Finally, the fact that Statoil has conspired with Ruhrgas to harm Plaintiffs in no way creates federal question jurisdiction. Statoil may be the Norwegian state-owned gas company, but it is *not* a party to this case. Ruhrgas is a privately-held German corporation. It is *not* state-owned, and it is not entitled under any federal statute to remove this case to federal court.

BACKGROUND

The factual background concerning this case is set out in detail in Plaintiffs' Petition. Rather than repeat those facts at length, Plaintiffs will summarize the facts bearing most directly on this motion.

Marathon indirectly acquired an interest in the Heimdal natural gas field in the 1970's when it acquired Pan Ocean Oil, Ltd. and its Norwegian affiliates. At the time,

Pan Ocean Oil Norge A/S held a Production License for the Heimdal gas field. That company was re-named Marathon Petroleum Norge A/S ("Norge") and has held the Production License ever since. The largest interest holder in the Heimdal gas field is Statoil, the Norwegian state-owned oil and gas company with whom Plaintiffs allege Ruhrgas has conspired to gain monopoly power.

The first development proposal for the Heimdal field called for the field to be connected to a British pipeline so that gas from the field could be transported to Great Britain. At the time, Marathon and Norge did not know that Statoil was jointly conspiring with Ruhrgas and a Ruhrgas-led consortium of European gas buyers to monopolize the Western European gas market. Subsequently, Statoil insisted that the Heimdal venturers scuttle the existing plans to hook up to a British pipeline and instead support the construction of a longer pipeline to connect Heimdal and other North Sea fields to Western Europe via a Ruhrgas-owned facility in Emden, Germany. To induce Marathon and MIOC to fund the development of the Heimdal field, Ruhrgas represented to Marathon that it would pay a premium price for Heimdal gas (as would its consortium partners) if the pipeline to Emden was constructed and Marathon (through MIOC or otherwise) advanced the necessary funds to its affiliates operating in Norway (Norge and/or MPCN) to enable the Heimdal field to be developed. Based on these and other assurances, Marathon and MIOC advanced hundreds of millions of dollars to such affiliates.

Although none of the Plaintiffs knew it, Ruhrgas never intended to pay a premium price for Heimdal gas. Instead, it only promised to pay such a price to induce

Marathon and MIOC to fund the Heimdal venture, including the construction and operation of a pipeline to Emden. Once Heimdal was connected to Ruhrgas' Emden facility, MPCN had no other means of selling Norge's gas to anyone other than Ruhrgas and its consortium. Ultimately, Ruhrgas refused to pay the promised premium price, and MPCN (the Marathon affiliate through which Heimdal's development and its attendant gas sales were accomplished) had no means of repaying the advances made to it by Marathon and MIOC. Marathon and MIOC now have suffered tremendous resulting losses. Given that none of the advances would have been made but for Ruhrgas' misrepresentations, Marathon and MIOC have filed this lawsuit to, among other things, recover damages for Ruhrgas' fraud.

Norge still holds the Production License to the Heimdal field. This license gives Norge the right to a portion of all Heimdal reserves, and includes the rights (and related obligations) to extract and sell Heimdal gas. Since 1975, Norge's rights to conduct development and sales operations have been assigned via a Pass Through Agreement to MPCN, who in turn contracted to sell Heimdal gas to Ruhrgas and its fellow consortium members. Norge did not, however, assign all of its interests in the Production License to MPCN; it continued to hold the license, retained a reversionary or remainder interest in all assigned rights under the license, remained liable to the Norwegian government under the license, and retained ownership of unsold gas in the Heimdal field.

MPCN recently advised Norge that it has given the required notice to terminate its gas sales contract with Ruhrgas next year. Once MPCN terminates its Gas Sales

Contract, its interest in the Production License will revert back to Norge because MPCN will be unable to fulfill its obligations under the Pass Through Agreement. Ruhrgas is currently refusing to permit any purchaser who does not belong to the Ruhrgas consortium to access the Heimdal gas flowing into Ruhrgas' facility in Emden, thereby preventing Norge from securing another buyer for the Heimdal gas. In this suit, Norge is seeking damages for this tortious interference, and for the lost value of its Heimdal license attributable to Ruhrgas' conduct.

Thus, this case is not about Ruhrgas' contract with MPCN as Ruhrgas would lead the Court believe. Instead, it concerns Ruhrgas' fraud that induced Marathon and MIOC initially to advance funds for the Heimdal project, its continuing fraud that induced Marathon and MIOC to continue that funding, and its interference with Norge's ability to realize the value of its license. To be sure, Ruhrgas has inflicted substantial contractual damage upon MPCN as well, but that is not the subject of this action. None of the Plaintiffs are asserting any contract claims, none are seeking a contract measure of damages, and none are making any claims on MPCN's behalf.

ARGUMENT

It is elementary that this Court's subject matter jurisdiction is controlled by Congress. *Yakus v. United States*, 321 U.S. 414 (1944). As Professors Wright and Miller note in opening their chapter on removal, "The right to remove a case from state to federal court is purely statutory and therefore is entirely dependent on the will of Congress." 14A Charles A. Wright, et al., *Federal Practice & Procedure* § 3721 (1985) ("Wright & Miller"); *Leffall v.*

Dallas Indep. School Dist., 28 F.3d 521, 524 (5th Cir. 1994) ("removal is an issue of statutory construction"); *Garg v. Narron*, 710 F.Supp. 1116, 1118 (S.D. Tex. 1989). Indeed, there is long, unbroken, and uniform agreement on this point among the courts. *Nolan v. Boeig, Co.*, 919 F.2d 1058, 1064 (5th Cir. 1990); *Finn v. American Fire & Gas. Co.*, 207 F.2d 113, 115 (5th Cir. 1953) ("The removal jurisdiction at the United States district courts is purely statutory"), *cert. denied*, 347 U.S. 912 (1954). Accordingly, unless some federal removal statute can be properly interpreted as providing the Court with subject matter jurisdiction over this proceeding, the case must be remanded. As should be obvious from Plaintiff's Petition, and as is further demonstrated below, there is no basis whatsoever for federal subject matter jurisdiction over this case.

I. THE CONTROLLING STANDARD

Aware of the increasing pressure on the federal docket and the great deference that should be afforded to a Plaintiff's choice of forum, Congress has expressly provided limited removal jurisdiction, and the federal courts (including the Fifth Circuit) uniformly have held that "[r]emoval statutes are to be strictly construed against removal." *Leffall*, 28 F.3d at 524; *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). Two other reasons are often cited in support of this rule. First, "the exercise of removal jurisdiction – particularly in diversity cases – is in derogation of state sovereignty." *Thompson v. Gillen*, 491 F.Supp. 24, 26 (E.D. Va. 1980) (citations omitted); accord *Shamrock*, 313 U.S. at 109; *United States ex rel. Walker v. Gunn*, 511 F.2d 1024, 1027 (9th Cir.) *cert. denied*,

423 U.S. 849 (1975); *Oltremari v. Kansas Social & Rehabilitative Serv.*, 871 F.Supp. 1331, 1343 (D. Kan. 1994).¹ Second, removal also is disfavored because it creates the possibility that the parties and the court could try the case to final judgment only to discover that there was no valid basis for federal jurisdiction. See e.g., *Vasquez v. Alto Bonito Gravel Plant Corp.*, 56 F.3d 689, 694 (5th Cir. 1995) (ordering remand after case had been fully tried); *Thompson*, 491 F.Supp. at 26; 14A *Wright & Miller* § 3739.

In light of the strictures governing removal, federal courts have consistently held that the "burden is on the party seeking to preserve the removal, not the party moving for remand, to show that the requirements for removal have been met." 14A *Wright & Miller* § 3739 at 574; *Asociacion Nacional de Pescadores v. Dow Quimica De Columbia*, 988 F.2d 559, 563 (5th Cir. 1993); *Garg*, 710 F. Supp. at 1117. Likewise, "[w]hen there is doubt as to the right of removal in the first instance, ambiguities are to be construed against removal." *Production Stamping*, 829 F.Supp at 1075; *Lackey v. ARCO*, 990 F.2d 202, 206 (5th Cir. 1993); *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981); *Oltremari*, 871 F.Supp. at 1342; 14A *Wright & Miller* § 3739, at 584. When considering a motion to remand, the Court need not look beyond the facts as pleaded in the Petition, but in any event, the Court "should . . . resolve all disputed questions of fact in favor of the plaintiff." *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995). Once the Court applies these

¹ See also *Production Stamping Corp. v. Maryland Casualty Co.*, 829 F.Supp. 1074, 1075 (E.D. Wis. 1993).

rules and resolves all disputed questions of fact in Plaintiffs' favor, it is readily apparent that this case should be remanded.

II. THERE IS NO FEDERAL QUESTION JURISDICTION

A. Plaintiffs Have Not Stated Any Federal Claims.

The Petition in this case certainly does not state any claim, in the words of 28 U.S.C. § 1441(b), "arising under the Constitution, treaties or laws of the United States." Even a cursory reading of the Petition reveals that its causes of action are confined exclusively to common-law fraud and tort claims arising out of Ruhrgas' conduct directed towards each of the Plaintiffs. Namely, the Petition alleges that Ruhrgas fraudulently induced Marathon and MIOC to loan their affiliate millions of dollars to help fund the development of the Heimdal gas field. Ruhrgas induced Marathon and MIOC to loan these funds by making promises it never intended to keep, by failing to disclose its on-going conspiracy to monopolize the relevant market, and by making several material misrepresentations. Based on the facts alleged in the Petition, Plaintiffs are pursuing the following state common-law causes of action seeking redress for the damages visited upon them by Ruhrgas: (1) fraud; (2) tortious interference; (3) participation in breach of fiduciary duty; (4) constructive fraud; and (5) civil conspiracy. None of these claims are grounded in federal law, and none "arise under the Constitution, treaties or laws of the United States."

B. There Is No Claim Against A Foreign Sovereign.

In the apparent hope of creating a federal question where none exists, Ruhrgas sheepishly argues that because it is a foreign corporation, and because its joint tortfeasor, Statoil, allegedly is a foreign sovereign, there must be federal question jurisdiction because the claims supposedly require the "resolution of international relations law." Nothing in Plaintiffs' Petition, however, requests (much less requires) the resolution of some amorphous "international relations law." While it is true that Congress has provided a limited basis for removal of cases involving foreign sovereigns, that provision limits removal to cases actually "**brought in a state court against a foreign state.**" 28 U.S.C. § 1441(d). It does not, as Ruhrgas implies, extend to any case in which the defendant asserts that "the interest of foreign countries" are somehow "affected." See *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989); *Delgado v. Shell Oil Co.*, 890 F.Supp. 1324, 1348-49 (S.D. Tex. 1995). Instead, the statute means precisely what it says. See, e.g., *Williams v. M/V Sonora*, 985 F.2d 808, 810-11 (5th Cir. 1993) (absence of foreign sovereign precludes this jurisdictional basis). A claim must actually be "brought" against the sovereign in state court before removal would be authorized, and even then, only the foreign sovereign would have the option to remove the case. See, e.g., *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1375 (5th Cir. 1980).

The Plaintiffs have not brought any claims against Statoil or any other supposed foreign sovereign with whom Ruhrgas may have conspired to control the market

for North Sea gas. While both the Texas and federal rules might permit Ruhrgas to join its joint tortfeasors, Ruhrgas has not filed any such third-party action against Statoil. See, Fed. R. Civ. P. 14. Hence, Statoil has not crossed the obvious bright line drawn in 28 U.S.C. § 1441 (d) – it is *not a party* to this action and will remain a non-party unless someone sues it.

Statoil's involvement in some of the underlying facts does not, in itself, provide a congressionally authorized basis for removal by Ruhrgas. See *Williams*, 985 F.2d at 811. Any argument to the effect that the mere involvement of a non-party foreign sovereign in some of the facts of a case is sufficient to create removal jurisdiction would twist the plain language of Section 1441(d) beyond all reasonable limits. Ruhrgas' implication that there is some as yet undefined federal common law source of federal removal jurisdiction is patently meritless. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816); see also *American Fire & Casualty Co. v. Finn*, 311 U.S. 6 (1951) ("jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation"); *Finn*, 207 F.2d at 115.²

² Ruhrgas cites two cases in support of its assertion of a free-wheeling "international issues" basis for removal jurisdiction. In *Kern v. Jeppesen Sanderson, Inc.*, 867 F.Supp. 525 (S.D. Tex. 1994), the plaintiff's well-pleaded complaint arose under a federal treaty, thereby clearly creating a federal question. In *Sequihua v. Texaco, Inc.*, 847 F.Supp. 61, 62-63 (S.D. Tex. 1994), the plaintiffs were residents of a foreign country. They sought a decree which would have required a transfer of title to real property located in a foreign nation, which spurred a formal protest from that country's government. In short, there was no state interest in the claim and, instead, the claim directly

C. Plaintiffs Are Not Parties To The MPCN/Ruhrgas Arbitration Agreement.

As its final basis for federal question jurisdiction, Ruhrgas points to the arbitration clause in its Gas Sales Contract with MPCN (a non-party), which requires MPCN to submit certain disputes with Ruhrgas to arbitration. While international arbitration awards and disputes centering on arbitration agreements may in some cases give rise to a separate and independent basis for removal (see *infra* at Section III), the presence of an arbitration clause in a contract between Ruhrgas and a non-party affiliate of Plaintiffs does not transform Plaintiffs' state law claims into federal questions. *Prudential-Bache Securities, Inc. v. Fitch*, 966 F.2d 981, 989 (5th Cir. 1992) (claim to compel arbitration under the Federal Arbitration Act is not a basis for federal jurisdiction).

In sum, the asserted bases for federal question jurisdiction in this case are nothing but shadows without substance. As a result, nothing in 28 U.S.C. § 1331 provides this Court with subject matter jurisdiction over this action.

affected the United States' foreign relations. By contrast, two of the Plaintiffs in this case are Texas residents; one is a Norwegian corporation. Many of the representations at the heart of this case were made in Texas, either by telex, telephone, or in person. The State of Texas, as a sovereign, has a strong interest at stake in cases in which residents of foreign nations have committed torts against its citizens, and within its borders. E.g., *Thompson*, 491 F.Supp. at 26.

III. THE 1985 GAS SALES CONTRACT BETWEEN RUHRGAS AND MPCN DOES NOT CREATE AN INDEPENDENT BASIS FOR REMOVAL

Ruhrgas urges that its Gas Sales Contract with a non-party creates a separate and independent basis for removal under legislation implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 9 U.S.C. §§ 201-208 (1994) (the "Convention").

A. The Convention's Own Terms Confirm That It Does Not Apply.

The Convention, by its express terms, requires that there be "*an agreement in writing under which the parties undertake to submit to arbitration all or any differences.*" Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. II, 3 U.S.T. 2517. The Convention defines "agreement in writing" as an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Thus, under the Convention, as elsewhere, arbitration is strictly "a creature of contract." *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 334 (5th Cir. 1987). Unless, the parties have come to an agreement in writing to arbitrate, the Convention and the legislation implementing it provide no basis for federal jurisdiction. *Sphere Drake Ins. PLC v. Marine Towing*, 16 F.3d 666, 669 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 195 (1994); *International Shipping Co., S.A. v. Hydra Offshore, Inc.*, 675 F. Supp. 146 (S.D.N.Y. 1987), *aff'd*, 875 F.2d 388 (2d Cir.), *cert. denied*, 493 U.S. 1003 (1989) (only parties to contract containing arbitration clause can be compelled to

arbitrate under the Convention). Because the none of the plaintiffs have consented to arbitration, much less done so in writing, the Convention has no conceivable application here.

B. The MPCN/Ruhrgas Arbitration Clause Applies Only To The Parties To The 1985 Gas Sales Contract.

1. A party cannot be compelled to arbitrate absent consent.

Quite apart from any technical writing requirements, it is beyond dispute as a general matter of federal constitutional law that a party cannot be compelled to arbitrate a claim unless it has knowingly consented to arbitration at some point. As the Supreme Court has repeatedly warned, "*the law compels a party to submit to arbitration only if he has contracted do so.*" *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991) (quoting *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974)); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S.Ct. 1212, 1216 (1995) ("arbitration is a matter of consent, not coercion").³ A court cannot compel a party to arbitrate his claims simply because it seems like a good idea to his opponent. *United States v. Paramount Pictures, Inc.*, 334 F.2d 131, 176 (1948); *see also Moses H. Cone*, 460 U.S. at 19-20.

³ *Accord Volt Info. Serv., Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1989); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19-20 (1983); *Britton v. Coop Banking Group*, 4 F.3d 742, 744 (9th Cir. 1993); *Ashland Oil*, 817 F.2d at 334.

The Supreme Court and the Fifth Circuit have unequivocally recognized a fundamental constitutional right of access to the courts in civil cases under the First Amendment's Petition Clause and the Due Process Clauses of the Fifth and Fourteenth Amendments. *California Motor Trans. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (First Amendment); *Bodie v. Connecticut*, 401 U.S. 371, 377 (1971) (due process); *Jackson v. Procunier*, 789 F.2d 307, 310-11 (5th Cir. 1980); accord *Hoeber ex rel. NLRB v. United Slate Tile & Composition Roofers Damp & Waterproof Workers Ass'n*, 939 F.2d 118, 126 (3rd Cir. 1991). Likewise, the Texas Constitution guarantees its citizens essentially unfettered access to the state's courts. E.g., Tex. Const. art. 1, § 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods person or reputation, shall have remedy by due course of law."); *id.* art. V, § 10 (right to trial by jury in civil cases).

The first question for the Court, therefore is whether any of the Plaintiffs ever have consented to arbitrate the claims made in this case, thereby waiving their right to bring the claims in state or federal court. *Volt Info Serv.*, 489 U.S. at 478; *Executone Information Sys., Inc. v. Davis*, 26 F.3d 1314 (5th Cir. 1994); *B.V. v. M.V. Sea Cattleya*, 852 F. Supp. 6, 8 (S.D.N.Y. 1994) (first question under Convention is whether the parties have agreed in writing); *Jones v. Sea Towing Serv. v. Freeport, N.Y. Inc.*, 828 F. Supp. 1002, 1015 (E.D.N.Y. 1993) (same; requiring arbitration), *rev'd*, 30 F.3d 360 (2d Cir. 1994). Ruhrgas claims the arbitration clause in its Gas Sales Contract with MPCN (an entirely different corporation) effectively eliminates any requirement of consent of the Plaintiffs; but a simple analysis of that contract reveals that its arbitration provision has

absolutely nothing to do with the Plaintiffs or their claims.

2. Plaintiffs are not parties to any arbitration agreement with Ruhrgas.

Ruhrgas itself notes in its Notice of Removal that its Gas Sales Contract is exclusively between Ruhrgas and MPCN, a distinct corporation that is not a party to this suit. *Ruhrgas concedes that it has no agreement whatsoever with any of the Plaintiffs:*

"Ruhrgas AG has never entered into any agreement with any of the plaintiffs concerning gas produced from the Heimdal field or any matters which are the subject of the First Amended Petition filed by the plaintiffs in this action."

Declaration of Lutz K. Eckert at ¶ 5. Thus, Ruhrgas admits that Plaintiffs are not parties to its Gas Sales Contract with MPCN. Nevertheless, despite the admitted absence of a contract, Ruhrgas argues that the MPCN/Ruhrgas arbitration clause should apply to Plaintiffs claims because the Plaintiffs are corporate affiliates of MPCN. In the first place, this argument completely fails to acknowledge any consent requirement, contractual or otherwise. Additionally, this argument fundamentally misperceives the law of corporations as well as the settled line of authority – which Ruhrgas completely ignores in its motions and supporting memoranda – holding that corporate parents are not bound by their wholly-owned subsidiaries' arbitration agreements. E.g., *Mowbray*, 795 F.2d at 1116; *Coltrain v. F.N. Wolf & Co., Inc.*, 818 F.Supp. 163, 163-64 (E.D. Va. 1993); *Gemco Latinoamerica, Inc. v.*

Seiko, Time Corp., 671 F.Supp. 972 (S.D.N.Y. 1987) (corporate parents not bound by arbitration clause between their wholly-owned subsidiary and plaintiff); 1 *Fletcher of Encyclopedia of the Law of Private Corporations* § 43.85 (1990 Rev. ed.); 2 *Federal Arbitration Law* § 18.4 (1995). Obviously, the fact that corporations are affiliated does not mean that each of them assents to, and personally agrees to be bound by, the terms of the other's contracts.

The unambiguous terms of its Gas Sales Contract also indicate that neither Ruhrgas nor MPCN even purported (much less had the authority) to bind their parents or other corporate affiliates to the terms of that contract's arbitration provision. Tellingly, the contract's preamble does not define either "MPCN" or "Ruhrgas" to include their parents or affiliates. It does, however, acknowledge the existence of such corporations, and even goes so far as to define the term "Affiliate" to mean any parent corporation of the parties, and any corporation of which such parent owns at least 50% of the voting shares. See Gas Sales Contract, ¶ 1.1(3).

Having acknowledged and defined "Affiliates," the contract refers to the defined term "Affiliate" only twice: in ¶ 7.4 to provide that any independent consultant appointed by the Buyers cannot be an employee or "Affiliate" of the Buyers, and in ¶ 14.3.2 to provide that any appointed expert cannot be an employee or "Affiliate" of either party to the contract. Article 15, which contains the contract's arbitration provisions, does not purport to apply to any contracting party's "Affiliates."

If the parties to the Gas Sales Contract had intended for that agreement's terms to bind their Affiliates, as

Ruhrgas now claims, they certainly could have provided as much in the contract. Instead, they chose to specifically identify their Affiliates and then *exclude* any reference to them in any substantive contractual provision, including the arbitration provision. These provisions are unambiguous, and plainly exclude the Plaintiffs in this case by their own terms.⁴ Even if there were some ambiguity, which there is not, the contract would have to be strictly construed *against* Ruhrgas, the contract's principal draftsman. *Mastrobuono*, 115 S. Ct. at 1219.

In short, nothing in the Gas Sales Contract remotely supports the notion that any contracting party's Affiliates assumed any obligation of any kind, or more importantly, that any non-signatory Affiliate consented to arbitration of any claims. See *Mowbray v. Moseley, Hallgarten, Estabrook & Weeden*, 795 F.2d 1111, 1116 (1st Cir. 1986) (finding arbitration provision inapplicable where parties to contract were aware of third-party but excluded third-party from arbitration clause); *Otto Wolf Hadelgesellschaft v. Sheridan Trans. Co.*, 800 F. Supp. 1353, 1357-58 (E.D. Va. 1992).

⁴ It is not surprising that the Gas Sales Contract did not purport to bind either party's Affiliates in any way. Like Marathon, Ruhrgas has many affiliates, and wanted to ensure that the contract at issue here would apply only to the signatories, and not their affiliated corporations. See *Mowbray*, 795 F.2d at 1116.

3. Plaintiffs have not otherwise consented to arbitration.

Thus, Ruhrgas has not met its burden of proving that the arbitration clause in its Gas Sales Contract with MPCN even applies to the Plaintiffs. Nor has it shown that Plaintiffs otherwise consented to arbitrate the claims at issue in this case. The simple and obvious fact is that Plaintiffs are different corporations and are entitled to being treated as such absent some basis for disregarding their corporate existence.⁵ None of the Plaintiffs has ever consented to arbitrate its disputes with Ruhrgas, or to otherwise waive its right of access to the courts or to a trial by jury. See *Fuentes v. Shevin*, 407 U.S. 67, 94-96 (1972) (holding that waiver of constitutional right of access must "at the very least be clear"); *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969) (canvassing rules regarding waiver of constitutional rights); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (first question court must ask is whether parties have agreed to resolve disputes by arbitration); *Mowbray*, 795 F.2d at 1116.

To be sure, a corporation, or any other person, may consent to arbitration without signing a contract, although a signature on the contract is the most common and reliable manifestation of consent. But Ruhrgas has not demonstrated that any of the Plaintiffs have ever consented to arbitrate their claims against it. In its separate motion for stay pending arbitration, Ruhrgas cites a handful of cases from other jurisdictions in support of its

⁵ No such basis has even been alleged (much less proven), nor could it be alleged in good faith.

contention that claims may be submitted to arbitration without any contractual relationship. But Ruhrgas' argument confuses two distinct notions: the scope of a clause vis-a-vis the parties who have assented to it, and the antecedent question of who has agreed or consented to arbitration in the first place. Far from suggesting (much less holding) that a party can be denied access to the courts and compelled to arbitrate without ever consenting, Ruhrgas' authorities actually confirm the fundamental need for consent.

Ruhrgas' principal authority, the Fourth Circuit's decision in *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile S.A.*, 863 F.2d 315 (4th Cir. 1988), is as good an example as any. In that case, the Plaintiff, J.J. Ryan, an importer of goods, had entered into distribution contracts with four related corporations, each of which was a seller to Ryan. Each of the contracts contained an arbitration clause and concerned the sale of goods. When the sellers threatened to terminate their agreements with Ryan and offered to buy Ryan out, Ryan filed suit against all four of the parties with whom it had contracted as well as their corporate parent, Rhone, alleging a joint tort theory. With respect to the issues that could be submitted to arbitration, the court held that each of Ryan's claims fell within the scope of the arbitration clause.

The court then went on to explore Ryan's separate argument that his claim against the parent, Rhone, could not be submitted to arbitration even though Ryan alleged that the parent and affiliates were jointly liable for the identical claims. The court began its analysis by stressing that "[a]lthough Rhone was not a party to the distribution contracts, it is willing to submit Ryan's disputes with it to

arbitration." *Id.* at 320 (emphasis added). At no point did the court imply that Rhone could be denied access to the courts without its consent. Instead, it merely held that a party could agree to arbitration by consent in open court, and that a plaintiff who had already agreed to submit its claims to arbitration, under certain circumstances, could not prevent the joinder of additional parties in the arbitration concerning the same claims.⁶ Critically, but not surprisingly, the court did not suggest or imply that a party could be forced to arbitrate a claim without ever manifesting consent in the first place. *See supra* at 12.

Likewise, each of the remaining cases cited by Ruhrgas founders under even the slightest scrutiny. To be sure, in some of the cases the court struggled with the breadth of a party's consent, but in every case, the party, under well-recognized rules of contract, had consented to submit its claims to arbitration. For example, Ruhrgas cites *Foster v. Sears, Roebuck & Co.*, 837 F. Supp. 1006, 1008 (W.D. Mo. 1993). However, Ruhrgas fails to point out that the court actually reaffirmed that "arbitration is a matter of contract and a party cannot be required to arbitrate any claim he has not agreed to so submit." *Id.* at 1008. Ruhrgas also fails to mention that the plaintiff in that case admitted in his own complaint that he was a party to the

⁶ Ryan's claims against Rhone were based exclusively on his allegation that the defendants were joint tortfeasors. Thus, Ryan's action against Rhone concerned claims that he had already agreed to submit to arbitration, albeit against different parties. This case, of course, is entirely different: the Plaintiffs never have consented to arbitrate any of the claims in dispute with anyone, including Ruhrgas, and the Plaintiffs' claims are distinct from any claim that MPCN might have against Ruhrgas.

contract containing the clause. Likewise, in *McBro Planning & Development Co. v. Triangle Electrical Construction Co., Inc.*, 741 F.2d 342 (11th Cir. 1984), both the plaintiff and the defendant had agreed to submit their claims to arbitration.⁷

Far from abandoning the constitutional consent requirement, as Ruhrgas claims, the Fifth Circuit in *In re Talbott Big Foot, Inc.*, 887 F.2d 611, 614 (5th Cir. 1989), actually held in that the appellants "[o]bviously . . . have not agreed to arbitrate their claims" because they "were not parties to the [contract]." In a footnote, the court went on to opine in dicta that the question "would be closer" if the parties could be bound by the results obtained in each other's litigation.⁸ But the court was careful to note that a

⁷ In *Ripmaster v. Toyoda Gosei, Co., Ltd.*, 824 F. Supp. 116 (E.D. Mich. 1993), the plaintiff was also a found to be an actual party to the contract. There, the defendant and the plaintiffs employer entered into a consulting contract calling for the plaintiff "to perform the services contemplated by the parties." Thus, the court held the plaintiff to be a party to the contract. The Gas Sales Contract contains no similar provisions regarding any of the Plaintiffs.

⁸ In sum, Ruhrgas' bald assertion that the corporate affiliate relationship might give rise to some loose res judicata implications, even assuming the relevance of such considerations, is patently absurd. *E.g.*, *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 410 (3d Cir. 1993) (joinder of corporate parent not required because judgment could not give rise to estoppel); *Hermes Automation Technology, Inc. v. Hyundai Elec. Indus., Inc.*, 915 F.2d 739, 750 (1st Cir. 1990); 18 *Wright & Miller* § 4460 at 533. It is hornbook law that issue and claim preclusion both require, at a minimum, that the same parties be involved and that the claims (or issues) be identical. *E.g.*, *CIR v. Sunnen*, 333 U.S. 591 (1948) ("issues . . . must be identical in all

"mere alignment of interests," as here, "would be insufficient."

Lest there be any room for confusion, none of the Plaintiffs have consented to arbitrate any of the claims in this case, and in fact, Ruhrgas' contract with MPCN was drafted specifically to exclude that possibility. Moreover, none of the Plaintiffs consents to any such arbitration now. See Affidavits of John A. Evans, William F. Schwind, Jr., and Finn Engzelius, all of which are attached to Plaintiffs' Motion to Remand. Given the absence of any consent to arbitration, the Plaintiffs cannot be denied their constitutionally guaranteed access to the courts.

C. Even Assuming For The Sake Of Argument That The Gas Sales Contract Could Provide Some Basis For Arbitration, The Claims In This Case Are Beyond The Scope Of The Arbitration Provision.

Quite apart from the fact that none of these Plaintiffs have consented to arbitration or otherwise waived their right of access to the courts, the allegations of fraud in the inducement and related claims in this case have nothing to do with the subsequent Gas Sales Contract between Ruhrgas and MPCN. The subject matter of Marathon's and MIOC's claims are the initial and continuing inducements to invest, *not* the gas deal later struck between

respects"). In this action, the Plaintiffs are different parties from MPCN, and their claims are entirely different from any MPCN could pursue. Accordingly, any final resolution of Plaintiffs tort claims could not, in any event, give rise to an estoppel of a subsequent contract dispute between Ruhrgas and MPCN.

MPCN and Ruhrgas. Likewise, Norge complains that the value of its license (*i.e.* the marketable value of gas that has not yet been extracted) has been destroyed by Ruhrgas' tortious interference and its monopolistic practices. All of Plaintiffs claims are based in tort, not contract, and none of those claims are based on Ruhrgas' Gas Sales Contract with MPCN in any way. To the contrary, all of Plaintiffs claims would exist *regardless* of whether Ruhrgas had ever entered a contract with MPCN.

Similarly, the damages sought by each Plaintiff are completely different from the contract expectancy damages MPCN might seek in a hypothetical dispute with Ruhrgas: Marathon and MIOC are seeking the amounts advanced to MPCN due to Ruhrgas' misrepresentations and fraudulent omissions, not the profit MPCN would have made had Ruhrgas honored its contract with MPCN. Norge is seeking the loss in value of its Production License, as well as damages associated with Ruhrgas' ongoing tortious interference with prospective business relationships between Norge and other potential gas buyers. Thus, even if the arbitration clause could somehow be applied to the Plaintiffs without their ever expressing assent to it, these claims still would not be arbitrable because they do not arise out of or relate to the Gas Sales Contract. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (stressing that "a party cannot be required to submit to arbitration any dispute which it has not agreed to submit").

D. Even Assuming For The Sake Of Argument That The Gas Sales Contract Could Provide Some Basis For Arbitration, It Would Not Provide A Basis For Removal.

Finally, even if the Gas Sales Contract had been signed by the Plaintiffs, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards still would not provide Ruhrgas with a statutory basis for removal.

The Convention is the "approximate . . . equivalent" of the Federal Arbitration Act, *McDermott Int'l. Inc. v. Lloyd's Underwriters of London*, 944 F.2d 1199, 1208 (5th Cir. 1991). The operative language of the Convention's removal provision states that a defendant may remove a case "[w]here the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award." To interpret this language, Plaintiffs submit that the Court should construe it in light of the Convention's purpose and the settled rule requiring strict construction against removal. See *Leffall*, 28 F.3d at 524. When so viewed, it is clear that Congress intended the Convention to permit removal only in two kinds of state court cases: those in which the plaintiff seeks enforcement of a foreign arbitral awards, and those cases in which the principal question is an interpretation of a foreign arbitration clause.⁹

⁹ Where, for example, a state court action is brought to determine where an arbitration is to occur, removal is proper. E.g., *McDermott*, 944 F.2d at 1200. In this way, foreign arbitration clauses are not subjected to varying interpretations in the fifty states. But this does not mean that every commercial case in

This case presents neither situation. As is true of cases arising under the Federal Arbitration Act, the Court should not be drawn into convoluted arguments supporting the purported application of an arbitration clause under the Convention. *Prudential-Bache Securities, Inc. v. Fitch*, 966 F.2d 981, 988 (5th Cir. 1992). At the most, the Convention's removal provision should require the Court to determine whether there is a substantial likelihood that an arbitration clause exists between the parties and that it controls as to the claims at issue. Where there does not appear to be such a likelihood from the face of the complaint or by a strong showing to that effect by the removing party, the case should be remanded. Cf. *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992) (doubts in controlling law resolved in favor of remand); *Production Stamping*, 829 F.Supp. at 1075 ("when there is doubt as to the right of removal in the first instance, ambiguities are to be construed against removal.")

IV. THERE IS NO DIVERSITY

As a fall-back, Ruhrgas claims that federal diversity jurisdiction exists in this case as well. However, the presence of aliens (Ruhrgas of Germany and Marathon Norge

which the defendant nakedly alleges that an arbitration provision has some tangential application may be resolved in federal court. Where the action is not directed at the clause itself, the risk of inconsistent rulings between the states is not so great, and resort to the federal courts is not unnecessary. If, as here, the parties do not even agree that the clause applies, the Court first should address that threshold question. There is no reason to assume that a federal forum will resolve this threshold question with any more consistency than the state courts.

of Norway) on both sides of the docket necessarily precludes diversity. *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1298 (5th Cir. 1985) (*per curiam*). To hurdle this determinative obstacle, Ruhrgas argues that Marathon Norge was fraudulently joined as a plaintiff.

Federal courts long have been suspicious of fraudulent joinder assertions, and such arguments are not favored. *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995). As the Fifth Circuit has repeatedly stressed, "The burden of persuasion placed upon those who cry 'fraudulent joinder' is indeed a heavy one." *Ford v. Elsbury*, 32 F.3d 931, 935 (5th Cir. 1994). In resolving such claims the court need not look beyond the averments in the Petition and, in all events, should not look beyond the documentary record. *Burden*, 60 F.3d at 217; *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir.), *cert. denied*, 498 U.S. 817 (1990). "[A]ll disputed questions of fact and all ambiguities in the controlling law [are resolved] in favor of the non-removing party." *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992). If the removing party cannot show that plaintiff has "no possibility of recovery," there is no fraudulent joinder, and the case must be remanded. *Id.*

The operative question is whether Norge has "any possible interest in the cause of action." *Wright & Miller* § 3641. In order to qualify as a party in interest, a plaintiff simply must be entitled under the governing law to enforce a right. *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 256-57 (5th Cir. 1980).

Norge owns the Production License covering the Heimdal field. Contrary to Ruhrgas's argument, Norge

has not abandoned its interest in the Heimdal field. Instead, the company has what amounts to a remainder interest in the field – it holds title to the Production License, it owns a percentage of the gas still in the ground in the Heimdal field, and *all* rights and obligations under the Production License will revert to it if MPCN defaults under the Pass Through Agreements. *See* Affidavit of Finn E. Engzelius. As Ruhrgas correctly points out, day-to-day operations currently are conducted by MPCN, but MPCN already has informed Norge that those operations essentially will cease when its contract with Ruhrgas terminates next year. There is also a value to the gas still in the ground that has not been sold. When MPCN ceases sales under its contract with Ruhrgas next year, Norge's interest in the field will not simply disappear; instead, Norge will be forced to find a buyer for its remaining gas. As is stressed in the Petition and noted above, the value of Norge's license has been greatly diminished as a result of Ruhrgas' wrongful interference and actions.

Norge's interest in the Heimdal field can be analogized to a remainder interest in mineral rights, although Norge's existing rights actually are greater than the typical remainder interest. There can be no doubting that the holder of remainder interest in valuable minerals has enforceable rights under Texas law. *E.g., Hamilton v. Hamilton*, 42 S.W.2d 814, 817 (Tex. Civ. App. – Amarillo 1931, writ ref'd); *see also*, 1 Eugene Kuntz, *Oil And Gas* § 8.3 (1987); 31 C.J.S. *Estates* § 98, at 185 (1964) ("The remainderman may sue for torts affecting his estate, although it also affects the estate of the tenant in possession."); *see also Yturri v. Yturri*, 504 S.W.2d 809 (Tex. Civ. App. – San

Antonio 1973, no writ) (trust). Thus, it is clear that Norge has much more than some "possibility of recovery" here. Indeed, Norge's presence here, albeit disquieting to Ruhrgas, is not only proper, it may well be essential. See Fed. R. Civ. P. 19 (regarding joinder of necessary parties).

V. THE COURT SHOULD ORDER REIMBURSEMENT OF COSTS, INCLUDING REASONABLE ATTORNEY'S FEES.

28 U.S.C. § 1447(c) provides that the Court may, in its discretion, "require payment of just costs and actual expenses, including attorneys fees" where a case has been removed improvidently. Here, there is not even an arguable basis for removal, as Ruhrgas should have known long before it filed its removal papers. Accordingly, Plaintiffs respectfully request an award of their costs and expenses, and will submit a summary of the fees and expenses they have incurred as a result of Ruhrgas' improper removal.

VI. CONCLUSION

This Court has no subject matter jurisdiction over this proceeding, and should remand the case to the state court in which it was filed. Plaintiffs have not stated any federal claims in their Petition, are not parties to any arbitration agreement with Ruhrgas, have not otherwise consented to any of the claims in this case being submitted to arbitration, and have not been fraudulently joined in any way. Ruhrgas' attempts to impose upon Plaintiffs the provisions of a separate contract between it and MPCN, a non-party, is not legally supportable, would

deprive Plaintiffs of their constitutional rights, and should be rejected immediately. This case never should have been removed, and Plaintiffs have been forced to spend a substantial amount of money to protect their rights. Accordingly, they request that the Court remand this case without delay and award them their costs in this matter.

Respectfully submitted,

/s/ Cliff Hutchinson

(w/permission by JT)

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CERTIFICATE OF SERVICE

A copy of this document was served on Ruhrgas' attorneys of record in accordance with Federal Rule of Civil Procedure 5, on September 14, 1995.

/s/

**IN THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF TEXAS
 HOUSTON DIVISION**

MARATHON OIL §
 COMPANY, MARATHON §
 INTERNATIONAL OIL §
 COMPANY and §
 MARATHON §
 PETROLEUM NORGE §
 A/S §
 Plaintiffs, §
 v. §
 RUHRGAS, A.G. §
 Defendant. §

**CIVIL ACTION NO.
 H-95-4176**

**PLAINTIFFS' MOTION FOR STAY PENDING
 RESOLUTION OF THEIR MOTION TO REMAND**

In light of, and subject to, their motion to remand, Marathon Oil Company, Marathon International Oil Company, and Marathon Petroleum Norge A/S, collectively "Plaintiffs," respectfully urge this Court to stay all further proceedings in this case pending resolution of their motion to remand.

1. Plaintiffs filed this action against Defendant Ruhrgas in Texas state court on July 6, 1995. Ruhrgas removed the case to this Court on August 21, 1995.

2. On September 15, 1995, Plaintiffs filed their motion to remand this action to the 152nd Judicial District Court of Harris County, Texas because this Court lacks subject matter jurisdiction over the dispute.

3. Defendant has filed a plethora of motions in this Court: motions to dismiss, a motion to stay, a motion to seal certain documents, etc. Before addressing the merits of any of these motions, the Court first should determine whether it has jurisdiction over this dispute. See *Kerbow v. Kerbow*, 421 F. Supp. 1253, 1258 (N.D. Tex. 1976); *Nichols v. Southeast Health Plan of Alabama*, 859 F. Supp. 553, 559 (S.D. Ala. 1993). If, as Plaintiffs contend, this Court lacks subject matter jurisdiction over the case, there will be no need for the Court to consider any of Defendant's other motions.

4. If this case ultimately is remanded, most of the issues raised by Defendant's outstanding motions will be treated differently in state court. For example, a Texas state court special appearance would focus on Defendant's contacts with Texas. See Tex. R. Civ. P. 120a. On the other hand, given Defendant's contention that federal question jurisdiction exists, its contacts with the entire United States may be relevant to its federal motion to dismiss. See Fed. R. Civ. P. 4(k)(2) and advisory committee notes pertaining thereto. Federal forum non conveniens practice is vastly different from Texas practice, which hardly recognizes the doctrine. Motions to seal under state law are governed by the requirements of Tex. R. Civ. P. 76a, not federal common law.

5. Accordingly, if the case ultimately is remanded, much of the time and money spent discovering and responding to the issues raised by Plaintiffs' motions will have been for nothing. To prevent this potential (and substantial) waste of resources, Plaintiffs request that the Court stay all further proceedings in this case pending its resolution of the Motion to Remand. This stay would,

among other things, excuse Plaintiffs from responding to Defendant's motions until after the Court has determined there is subject matter jurisdiction, and protect all parties from the expense associated with unnecessary discovery and motion practice. Such stays certainly are not unusual in this District. Cf. *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1369 (S.D. Tex. 1995).

Wherefore, Plaintiffs move the Court to stay all further proceedings in this action until the pending Motion to Remand is resolved.

Respectfully submitted,

/s/ Clifton T. Hutchinson*

*w/authority LA Freeman

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CERTIFICATE OF CONFERENCE

Counsel for movant has conferred with counsel for respondent, and they cannot agree about the disposition of this motion.

/s/ Greg Taylor*
 *w/authority LA Freeman

CERTIFICATE OF SERVICE

A copy of this document was served on Defendant's attorneys of record in accordance with Federal Rule of Civil Procedure 5, on September 15th, 1995.

/s/ Greg Taylor
 *w/authority LA Freeman

**IN THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF TEXAS
 HOUSTON DIVISION**

MARATHON OIL COMPANY,)	
MARATHON INTERNATIONAL)	
OIL COMPANY, and	)	CIVIL ACTION
MARATHON PETROLEUM	)	NO. H-95-4176
NORGE A/S,)	
)	
Plaintiffs,)	
)	
VS.)	
)	
RUHRGAS, A.G.,)	
)	
Defendant.)	

**RUHRGAS AG'S MOTION FOR ORDER STAYING
 MERITS DISCOVERY, DEFERRING RULE 26(f)
 MEETING AND RULE 26(a) INITIAL
 DISCLOSURES, AND AUTHORIZING LIMITED
 DISCOVERY ON SUBJECT MATTER JURISDICTION
 AND PERSONAL JURISDICTION ISSUES**

TO THE HONORABLE UNITED STATES DISTRICT
 JUDGE:

Ruhrgas AG, Defendant herein, subject to and without waiver of its previously filed motions, including without limitation its Motion to Dismiss for lack of personal jurisdiction and for insufficient service of process, files this Motion for Order Staying Merits Discovery, Deferring Rule 26(f) Meeting and Rule 26(a) Initial Disclosures, and Authorizing Limited Discovery on Subject Matter Jurisdiction and Personal Jurisdiction Issues, and would show the Court the following:

1. This case was originally filed by Plaintiffs in the 152nd District Court of Harris County, Texas. On August 21, 1995, Ruhrgas AG removed the case to this Court.

2. On August 28, 1995, Ruhrgas AG filed the following motions:

- a) Motion to Dismiss Under Fed. R. Civ. P. 12(b)(2), (4), and (5);
- b) Motion for Stay Pending Arbitration; and
- c) Motion to Dismiss on *Forum Non Conveniens* Grounds;

3. Plaintiffs have now filed a Motion to Remand, asking this Court to remand this case to state court.

4. The parties have stipulated that the time for Plaintiffs to respond to that portion of the Motion to Dismiss based on lack of personal jurisdiction and to the Motion to Dismiss on *Forum Non Conveniens* Grounds should be extended to December 1, 1995, and that the time for Defendant to respond to Plaintiffs' Motion to Remand should be extended to December 1, 1995. This stipulation has been approved by the Court.

5. Pursuant to the Order of Conference entered in this case, an initial pre-trial and scheduling conference is scheduled before U.S. Magistrate Judge Frances H. Stacy on November 1, 1995. The Order of Conference further provides that a joint report of the meeting required by Fed. R. Civ. P. Rule 26(f) and a joint discovery/case management plan be filed not less than 10 days before the November 1, 1995 conference. Pursuant to Fed. R. Civ. P. Rule 26(d), merits discovery would commence after the Rule 26(f) meeting, and the parties would be required to

make their initial disclosures within 10 days thereafter pursuant to Fed. R. Civ. P. Rule 26(a)(1).

6. Ruhrgas AG respectfully submits that merits discovery (and the Rule 26(f) meeting and initial disclosures, which relate to merits discovery), should be stayed and deferred until after the Court has ruled on the dispositive motions filed by the parties. The Fifth Circuit has held that a trial court may properly exercise its discretion to stay merits discovery pending a decision on dispositive motions. *Corwin v. Marney, Orton Investments*, 843 F.2d 194, 200 (5th Cir. 1988). As shown below, such an order is particularly appropriate for the dispositive motions pending before the Court in this case.

7. In its Motion to Dismiss Under Fed. R. Civ. P. 12(b)(2), (4), and (5), Ruhrgas AG has challenged personal jurisdiction and, given Plaintiffs' admitted failure to serve Ruhrgas AG, a German corporation, under the Hague Service Convention, the sufficiency of service of process. With respect to personal jurisdiction, in *Riverplate Corp. v. Forestal Land, Timber & Railway Co., Ltd.*, 185 F. Supp. 832, 836 (S.D.N.Y. 1960), the Court stayed merits discovery on the merits pending a determination of the personal jurisdiction challenge made by the defendants, stating:

If the moving defendants are right in their claim that they are not to be 'found' within the jurisdiction, it would be grossly unfair to subject them to examination as parties and to force them to disclose private and confidential material with respect to their business practices. . . . [I]f this Court has no jurisdiction over the moving defendants they should not be placed in the

position of being forced to disclose details of transactions which may be entirely lawful under foreign law.

185 F. Supp at 836. *See also Wright v. Xerox Corp.*, 882 F. Supp. 399, 409, 411 (D.N.J. 1995) (trial court reserved decision on the personal jurisdiction issue as to one defendant and limited discovery as to that defendant strictly to the issue of personal jurisdiction). Similarly, a stay of merits discovery is justified pending a decision on a challenge to the sufficiency of service of process. *See Thompson v. F.W. Woolworth Co.*, 508 F. Supp. 520, 521 (N.D. Miss. 1980). A stay is particularly appropriate here given the international comity interests involved in the application of the Hague Service Convention, which the U.S. Supreme Court has held to be mandatory where transmittal of service abroad is required. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988). These international comity interests would be violated if Ruhrgas AG were required to respond to merits discovery before being properly served under the Hague Service Convention.

8. Ruhrgas AG has also filed a Motion for Stay - Pending Arbitration. Discovery on the merits prior to arbitration is inconsistent with the aims of arbitration. *Suarez-Valdez v. Shearson Lehman/American Express, Inc.*, 858 F.2d 648 (11th Cir. 1988). Where a defendant has urged that a dispute should be stayed pending arbitration, the court should stay merits discovery pending the determination of the arbitrability issue because "discovery would be affirmatively inimical to [plaintiffs] obligation to arbitrate, if this court determines it to have such obligation." *Lummus Co. v. Commonwealth Oil Refining*

Co., Inc., 273 F.2d 613, 613 (1st Cir. 1959); *see also ARW Exploration Corp. v. Aguirre*, Fed. Sec. L. Rep. (CCH) ¶ 95, 776 (W.D. Okla. 1990) (court denied discovery on issues other than arbitrability pending ruling on motion to compel arbitration).

9. The pendency of Ruhrgas AG's Motion to Dismiss on *Forum Non Conveniens* Grounds also justifies a stay of merits discovery. In *Transunion Corp. v. Pepsico, Inc.*, 811 F.2d 127, 130 (2nd Cir. 1987), the Second Circuit affirmed the trial court's decision to stay discovery pending determination of a motion to dismiss on *forum non conveniens* grounds. The Second Circuit relied in part on the U.S. Supreme Court's decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 233, 258 (1981), wherein the Court noted that [r]equiring extensive investigation would defeat the purpose of [the] motion." *Transunion Corp.*, 811 F.2d at 130, *quoting Piper Aircraft*, 454 U.S. at 258.

10. As shown by the authorities discussed above, a stay of merits discovery is warranted pending a ruling on the dispositive motions filed herein. Ruhrgas AG respectfully requests an order staying merits discovery and deferring the Rule 26(f) meeting and the initial disclosures required by Rule 26(a) until the Court has ruled on the dispositive motions.

11. Although merits discovery on the merits is inappropriate at this stage of the proceedings, limited discovery directed solely to issues raised by the dispositive motions is appropriate.¹ Although the parties have

¹ The Court is not required to resolve the Motion to Remand prior to considering the other dispositive motions. *See*,

attempted to agree on the scope of limited discovery to address these issues pursuant to Rule 26(d), FEDERAL RULES OF CIVIL PROCEDURE, the parties have been unable to reach any such agreement as a result of Plaintiffs' refusal to agree to any discovery on any subject matter jurisdiction issues. Contrary to Plaintiffs' position, the Fifth Circuit has recognized that factual issues may arise in determining subject matter jurisdiction on which discovery is appropriate. For example, in *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir. 1990), the Fifth Circuit noted that in resolving an issue of fraudulent joinder in determining removal jurisdiction, the court is authorized to consider evidence outside of the pleadings, including deposition transcripts. Similarly, in *Marcel v. Pool Co.*, 5 F.3d 81 (5th Cir. 1993), the Fifth Circuit upheld the denial of the Plaintiffs' motion to remand, which was based on an alleged insufficiency of the amount in controversy, stating that the Defendant "timely conducted discovery, and in response to [Plaintiffs] motion to remand, provided a detailed explanation of why it was apparent that the claim almost certainly was for well in excess of the jurisdictional threshold." 5 F.3d at 85 (emphasis added). In the same vein, the courts have routinely permitted discovery on issues relating to a corporation's

e.g., *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1494 (5th Cir. 1993), cert. denied, 114 S. Ct. 690 (1994) ("in *Walker*, we clearly held that district courts have the power to rule on motions challenging personal jurisdiction before reaching motions to remand."); *Walker v. Savell*, 335 F.2d 536, 539 (5th Cir. 1964).

principal place of business in determining whether diversity jurisdiction exists. See, e.g., *Center for Radio Information, Inc. v. Herbst*, 876 F. Supp. 523-24 (S.D.N.Y. 1995).

12. These authorities demonstrate that discovery on subject matter jurisdiction issues is appropriate where the subject matter jurisdiction determination requires a factual inquiry. Such factual issues are presented here. For example, factual issues are raised on the questions whether Marathon Petroleum Norge A/S, the allegedly non-diverse Plaintiff, is a real party-in-interest and/or was fraudulently joined for the purpose of defeating diversity. As noted above, the Fifth Circuit has expressly held that with respect to such an issue, the court may go outside the pleadings and consider discovery products. *Carriere*, 893 F.2d at 100. Furthermore, under 9 U.S.C. § 206, this Court has removal jurisdiction if any of the claims at issue are subject to arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Award, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("the Convention"), which need not appear from the face of the complaint, but which may be shown in the Notice of Removal. 9 U.S.C. § 206. As shown in the Notice of Removal, Ruhrgas AG contends that the claims asserted by Plaintiffs are derivative of those of their corporate affiliate, Marathon Petroleum Company (Norway) ("MPCN"), which has an arbitration agreement with Ruhrgas AG, and that Plaintiffs are therefore bound to arbitrate their claims herein. Ruhrgas AG should be permitted to conduct discovery on the derivative nature of Plaintiffs' claims and the relationships between Plaintiffs and MPCN to establish that Plaintiffs are bound by the

arbitration agreement and that this Court has subject matter jurisdiction under the Convention.

13. Pursuant to Rule 26(d), FEDERAL RULES OF CIVIL PROCEDURE, Ruhrgas AG respectfully requests authorization from the Court to conduct discovery limited to issues relevant to personal jurisdiction and subject matter jurisdiction. Specifically, Ruhrgas AG seeks authorization to take the deposition of Finn E. Engzelius, who has provided a Declaration in support of Plaintiff's Motion to Remand, pursuant to the notice attached hereto as Exhibit '1', as well as the deposition and document discovery described in the deposition notices attached hereto as Exhibits "2", "3", "4", and "5".

WHEREFORE, subject to Ruhrgas AG's previously filed motions, and without waiving same, Ruhrgas AG respectfully requests that the Court enter an Order (1) staying merits discovery and deferring the Rule 26(f) meeting and Rule 26(a)(1) initial disclosures, and (2) authorizing Ruhrgas AG to conduct the limited deposition and document discovery on personal jurisdiction and subject matter jurisdiction issues described in the deposition notices attached hereto as Exhibits "1", "2", "3" "4"

and "5", and that Ruhrgas AG have such other and further relief to which it may be justly entitled.

Respectfully submitted,

/s/ Ben H. Sheppard, Jr.

by permission

BEN H. SHEPPARD, JR.

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CERTIFICATE OF CONFERENCE

I have conferred with opposing counsel and have been informed that Plaintiffs oppose this Motion.

/s/ Guy S. Lipe
GUY S. LIPE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on counsel of record for Plaintiffs by certified mail, return receipt requested this 4th day of October, 1995.

/s/ Guy S. Lipe
GUY S. LIPE

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

MARATHON OIL COMPANY,)	
MARATHON INTERNATIONAL)	
OIL COMPANY, and	)	CIVIL ACTION
MARATHON PETROLEUM	)	NO. H-95-4176
NORGE A/S,)	
Plaintiffs,)	
VS.)	
RUHRGAS, A.G.,)	
Defendant.)	

**RUHRGAS AG'S RESPONSE TO
PLAINTIFFS' MOTION FOR STAY PENDING
RESOLUTION OF THEIR MOTION TO REMAND**

(Filed Oct. 5, 1995)

TO THE HONORABLE JUDGE OF THE UNITED STATES
DISTRICT COURT:

Defendant Ruhrgas AG, subject to and without waiver of its previously filed motions, including but not limited to its Motion to Dismiss for lack of personal jurisdiction and for insufficiency of process or service of process, files its Response to Plaintiffs' Motion for Stay Pending Resolution of their Motion to Remand.

I.

THE COURT MAY DECIDE THE MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(2), (4) & (5) BEFORE REACHING THE MOTION TO REMAND

Plaintiffs ask this Court to stay all further proceedings in this case, including any action on Ruhrgas AG's motions to dismiss, pending resolution of Plaintiffs' Motion to Remand. Initially, Plaintiffs contend that the Court must first determine whether it has subject matter jurisdiction before reaching all motions filed by Ruhrgas AG.¹ Plaintiffs are incorrect. This Court has discretion to reach Ruhrgas AG's Motion to Dismiss Under Fed. R. Civ. P. 12(b)(2), (4), and (5) before addressing Plaintiffs' Motion to Remand. The Fifth Circuit has unambiguously granted this Court that discretion:

We think here the trial court had the power to dispose of the motion to quash before first passing on the motion for remand. . . . Since this case was, under the terms of the removal statute, unquestionably in the district court even though later subject to a proper motion for remand, if a suit could properly be pending anywhere, once it became apparent by the filing of the motion to quash service of process that there was a question raised by the defendant below whether it could properly be brought into court in Mississippi under any circumstances, it was proper for the trial court to examine into this question

¹ Ruhrgas AG has filed the following motions to date: (1) Motion to Dismiss Under Fed. R. Civ. P. 12(b)(2), (4), and (5), (2) Motion for Stay Pending Arbitration, (3) Motion to Dismiss on *Forum Non Conveniens* Grounds, and (4) Motion to Seal Gas Sales Agreement.

immediately and not subject the defendant, so protesting, to a further hearing on the motion to remand and possibly to a further hearing in a state court where it would then have to raise once again the question of personal jurisdiction. Once appellee lodged in the district court its challenge to the jurisdiction in *personam*, it was entirely appropriate for that court to inquire into, and resolve, that issue.

Walker v. Savell, 335 F.2d 536, 538-539 (5th Cir. 1964). The Fifth Circuit recently reaffirmed its holding in *Walker* and noted that judicial economy favors such an approach:

In *Walker*, we clearly held that district courts have the power to rule on motions challenging personal jurisdiction before reaching motions to remand. *As we noted, judicial economy favors this result because if the district court remands the proceeding, then the state court will probably have to decide the same motion to dismiss for lack of personal jurisdiction that the district court avoided.*

Villar v. Crowley Maritime Corp., 990 F.2d 1489, 1494 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 690 (1994) (emphasis added); *see also Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1066 (5th Cir.), *cert. denied*, 113 S. Ct. 193 (1992).

Plaintiffs rely on two district court cases for the proposition that the Court should first determine "whether it has jurisdiction over this dispute." *See Kerbow v. Kerbow*, 421 F. Supp. 1253, 1258 (N.D. Tex. 1976); *Nichols v. Southeast Health Plan of Ala.*, 859 F. Supp. 553, 559 (S.D. Ala. 1993). The clear holdings of the Fifth Circuit in

Villar, Petty-Ray Geophysical, and *Walker* govern this Court, not the holdings of *Kerbow* and *Nichols*.

II.

THE STAY REQUESTED BY PLAINTIFFS DOES NOT PROVIDE AN EFFICIENT MECHANISM FOR THE RESOLUTION OF THE PENDING MOTIONS

A. The Remand Issues Are Intertwined With Issues Raised by Ruhrgas AG's Motions.

The stay requested by Plaintiffs would not promote judicial economy because the issues involved in determining subject matter jurisdiction overlap with the issues raised in Ruhrgas AG's Motion to Dismiss Under Fed. R. Civ. P. 12(b)(2), (4), & (5), its Motion for Stay Pending Arbitration, and its Motion to Dismiss on *Forum Non Conveniens* Grounds. For example, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, provides a basis for subject matter jurisdiction as well as a stay pending arbitration. Further, the question whether federal question jurisdiction exists under 28 U.S.C. § 1331 based on the substantial questions of foreign and international relations and questions of customary international law and act of state issues raised by Plaintiffs' claims, as well as the issues raised by the motions to dismiss for lack of personal jurisdiction and on *forum non conveniens* grounds, require examination of the numerous foreign contacts in this case. Additionally, discovery concerning the lack of personal jurisdiction over Ruhrgas AG will also be relevant to the Court's consideration of the Motion to Dismiss on *Forum Non Conveniens* Grounds. Cf.

Villar, 990 F.2d at 1495 (noting the overlap in discovery on personal jurisdiction and *forum non conveniens* issues). Because the issues raised by Ruhrgas AG's motions overlap with the issues raised in Plaintiffs' Motion to Remand, judicial economy would be served if all of the overlapping discovery relevant to all of the motions is simultaneously conducted, all of the motions are fully briefed, and the Court determines in its discretion the order in which the motions should be ruled on by the Court.

B. State Court Analysis Would Be Identical.

Next, Plaintiffs incorrectly argue that certain issues will be "treated differently in state court." Plaintiffs' Mot. to Stay, at 2. Plaintiffs argue that the analysis on the issue of personal jurisdiction is different. However, the Texas long-arm statute has been interpreted to extend as far as federal due process protections will allow; therefore, the inquiry in either federal or state court is the same – whether the Court's exercise of personal jurisdiction comports with federal constitutional requirements. *Bullion v. Gillespie*, 895 F.2d 213, 215 & 215 n.2 (5th Cir. 1990) ("[T]he reach of the Texas long-arm statute . . . has been interpreted by Texas courts as extending to the limits of due process."); *Guardian Royal Exchange Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991) ("[W]e consider only whether it [the Texas long-arm statute] is consistent with federal constitutional requirements of due process for Texas courts to assert *in personam* jurisdiction."). Additionally, in the context of asserting personal jurisdiction over a foreign defendant, both the Supreme Court of the United States and the Texas Supreme Court have cautioned that "[g]reat care

and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 115 (1987); *Guardian Royal*, 815 S.W.2d at 229 (quoting *Asahi*).²

Plaintiffs then argue that "[f]ederal *forum non conveniens* practice is vastly different from Texas practice, which hardly recognizes the doctrine." Plaintiffs' Mot. to Stay, at 2. While this was true in personal injury and wrongful death cases, this is not true with respect to the allegations made the basis of this lawsuit. *See, e.g., Flaiz v. Moore*, 359 S.W.2d 872, 874 (Tex. 1962) (acknowledging existence of the doctrine in Texas); *A.P. Keller Dev., Inc. v. One Jackson Place, Ltd.*, 890 SW.2d 502, 505 (Tex. App. - El Paso 1994, no writ) (affirming trial court's dismissal on

² Plaintiffs suggest in their Motion that the potential applicability of Rule 4(k)(2), Federal Rules of Civil Procedure, to the personal jurisdiction analysis in the event a federal question is identified by the Court requires that the Court first consider the subject matter jurisdiction issues raised by the Motion to Remand. Rule 4(k)(2) applies only in the rare circumstance in which the plaintiff proves that (1) a federal question exists, (2) the defendant is not subject to the jurisdiction of the courts of general jurisdiction of any of the fifty states, and (3) the exercise of jurisdiction is nevertheless consistent with the Constitution and laws of the United States. Nothing in the First Amended Petition or any other pleading filed by Plaintiffs suggests that Plaintiffs intend to rely on Rule 4(k)(2) in support of personal jurisdiction. To the contrary, the papers filed by Plaintiffs to date demonstrate that Plaintiffs' personal jurisdictional argument is that the Texas courts do have jurisdiction over the person of Ruhrgas AG. As shown herein, the analysis utilized in determining the validity of such an argument is the same in the federal and state courts.

forum non conveniens grounds); *Sarieddine v. Moussa*, 820 S.W.2d 837, 839-40 (Tex. App. - Dallas 1991, writ denied) (holding that Texas courts still recognize doctrine outside of personal injury and wrongful death cases). All of these Texas cases applied the factors enumerated in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), which are the same factors federal courts apply in determining whether to dismiss an action on *forum non conveniens* grounds. *See, e.g., Bauingart v. Fairchild Aircraft Corp.*, 981 F.2d 81-4, 835-36 (5th Cir. 1993), *cert. denied*, 113 S. Ct. 2963 (1993).

Finally, Plaintiffs cite *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1369 (S.D. Tex. 1995) for the proposition that the courts in this district have granted stays of the type requested by Plaintiff. In *Delgado*, the court "simultaneously consider[ed] the merits of plaintiffs' motions to remand and to dismiss for lack of subject matter jurisdiction and *defendants' motions to dismiss for f.n.c.*" *Id.* at 1369 (emphasis added). Further, the opinion in *Delgado* does not show that any motion to dismiss for lack of personal jurisdiction or insufficiency of process was pending.

For these reasons, Ruhrgas AG respectfully requests, subject to and without waiver of its previously filed Motions, including but not limited to its Motion to Dismiss for lack of personal jurisdiction and for insufficiency of process or service of process, that the Court deny

Plaintiffs' Motion for Stay Pending Resolution of their Motion to Remand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were served on all counsel of record by certified mail, return receipt requested this 5th day of October, 1995.

/s/ Guy S. Lipe
 GUY S. LIPE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL	§	
COMPANY, MARATHON	§	
INTERNATIONAL OIL	§	
COMPANY, and	§	CIVIL ACTION NO.
MARATHON	§	H-95-4176
PETROLEUM NORGE	§	
A/S	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
RUHRGAS, A.G.	§	
	§	
Defendant.	§	

**PLAINTIFFS' RESPONSE TO DEFENDANT'S
MOTION TO STAY AND TO
LIMIT DISCOVERY**

Plaintiffs Marathon Oil Company, Marathon International Oil Company, and Marathon Petroleum Norge A/S file the following response to Defendant Ruhrgas A.G.'s Motion for Order Staying Merits Discovery, Deferring Rule 26(f) meeting and Rule 26(a) Initial Disclosures, and Authorizing Limited Discovery on Subject Matter and Personal Jurisdiction Issues.

Summary of Argument

Two months ago, Ruhrgas removed this case to federal court and immediately filed a number of motions seeking to have the action dismissed. Those motions, along with Plaintiffs' motion to remand, still are pending.

Now Ruhrgas has asked the Court to stop all other activity in the case while Ruhrgas conducts "limited" discovery on personal and subject matter jurisdiction issues. This request is unnecessary, unworkable, and improper.

Plaintiffs previously have filed a motion stay this case (including all discovery) pending the Court's decision on their Motion to Remand.¹ If the Court grants that motion or ultimately remands the case, Defendant's motion will be moot. But even if the Court ultimately declines to remand the case, there still is no reason to restrict discovery. If the case remains in federal court, Plaintiffs will require (and are entitled to) substantial discovery on the remaining personal jurisdiction issues. Because "specific" jurisdiction in any case hinges on the merits (here, on the occurrence of misrepresentations and omissions by Ruhrgas in Texas), the jurisdictional issues necessarily (and substantially) overlap with issues on the merits. Accordingly, discovery cannot be "limited" as Ruhrgas suggests.

Ruhrgas' request to conduct its own discovery on personal jurisdiction issues is patently unnecessary. The only personal jurisdiction issue in this case is Ruhrgas' assertion that it is not subject to personal jurisdiction in Texas.² Obviously, Ruhrgas already has complete knowledge of its own jurisdictional contacts, so it certainly does

¹ See Plaintiffs' Motion for Stay Pending Resolution of Their Motion to Remand. Oddly enough, Defendant opposes such a stay.

² Despite its own contention that federal jurisdiction is based on the presence of a federal question, (Ruhrgas Notice of Removal at 1) Ruhrgas has ignored the application of the federal long-arm statute which does not inquire into Ruhrgas' contacts

not need to conduct discovery on personal jurisdiction issues.

Despite having already removed this case, Ruhrgas nevertheless wants to conduct "subject matter jurisdiction" discovery to determine whether there are any facts available to support that removal. This request is as extraordinary as it is improper. In opposing Plaintiffs' motion to remand, Ruhrgas will have the burden of proving that the case was removable *as of the time* the Notice of Removal was filed. Under federal law, a case may not be removed until it has "become removable," an inquiry ordinarily resolved by reference to the plaintiff's pleading, the Notice of Removal, and in some cases affidavits. When Ruhrgas removed this case, it either possessed facts to support removal jurisdiction or it did not. If it possessed such facts, it certainly does not need a stay to conduct additional discovery to find them now. If it did not possess such facts, then it improperly removed this case in violation of Federal Rule 11 and 28 U.S.C. § 1446.

Moreover, in light of the affidavits filed in support of Plaintiffs' motion to remand, the best Ruhrgas could hope to do in its proposed "limited" discovery would be to raise some contested issue of fact. All such issues, of course, must be resolved in Plaintiffs' favor for remand purposes; so further discovery could not possibly advance any outstanding issue. Plaintiffs respectfully urge that the proper course would be to deny Ruhrgas' request and to either rule on the remand question or to

with *Texas*. Instead, it requires examination of Ruhrgas' contacts with the United States. See Fed. R. Civ. P. 4(k) and related Advisory Committee Notes.

permit discovery to go forward without the restrictions Ruhrgas proposes.

I. Plaintiffs Already Have Requested A More Limited Stay.

The Plaintiffs previously have requested that the Court stay this case until Plaintiffs' Motion to Remand is resolved.³ In addition to its current request for a stay to conduct discovery on its removal, Ruhrgas has moved to stay the entire case pending arbitration, to quash service and to dismiss on a variety of grounds. Presumably, the Court will resolve Plaintiffs' remand motion before (or, at the latest, concurrently with) many of Defendants' outstanding motions. If the Court grants Plaintiffs' motion to stay, Defendant's motion will become moot for the time being because the Court already will have stayed the case. In any event, however, the Court should deny Ruhrgas' request to stay all other discovery while it investigates its own removal. Ruhrgas' request to stay the case while it supposedly "discovers" the basis for its removal and its own jurisdictional contacts seems less directed at relevant issues than delay. As set forth more fully below, such requests are premature, improper, and/or irrelevant.

³ See Plaintiffs' Motion to Stay Pending Resolution of their Motion to Remand (9/15/95).

A. *Unlike the Remand Question, the Personal Jurisdiction Question Involves Substantial Factual Inquiry that Need Not Be Resolved at the Outset.*

If this case is not remanded, Plaintiffs will need to conduct discovery related to personal jurisdiction. It is not clear from Ruhrgas' motion whether Ruhrgas would even permit the Plaintiffs to conduct discovery related to personal jurisdiction, although the Plaintiffs clearly are entitled to conduct such discovery. *E.g., Skidmore v. Syntex Labs., Inc.*, 529 F.2d 1244, 1248 (5th Cir. 1976).⁴ To the extent removal jurisdiction in this case involves a federal question, which Ruhrgas asserts, Plaintiffs also will need to conduct discovery on Ruhrgas' contacts with the United States, as well as Texas. *See* Fed. R. Civ. P. 4(k)(2) and the Advisory Committee Notes relating to that rule; *Eskofot Als v. Dupont*, 812 F.Supp. 81, 87 (S.D. N.Y. 1995). If the case ultimately is remanded, discovery relating to issues such as Ruhrgas' U.S. contacts will have been nothing but wasted effort.

B. *There is no Reason to Conduct Discovery in Phases, Particularly Where Jurisdictional Issues Overlap with the Merits.*

Many of the personal jurisdiction discovery issues substantially overlap with the merits of this case.⁵ For

⁴ The only reason Plaintiffs have not yet begun taking this discovery is that their Motion to Stay Pending Resolution of their Motion to Remand still is pending.

⁵ Discovery on general personal jurisdiction would not overlap with the merits. Discovery on specific personal

example, Ruhrgas has traveled to Texas to meet with Marathon representatives on several occasions. It also has made numerous phone calls to Marathon in Texas, and has sent numerous faxes, telexes, letters and other documents to Marathon in Texas. Many of these contacts directly concern Marathon's investment in the Heimdal field, which is the subject matter of this litigation. As a result, it makes little sense to take discovery that would prove up the fact of these contacts, but stop short of discussing their content. *See Wyatt v. Kaplan*, 686 F.2d 276, 280 (5th Cir. 1982) ("When, as in this case, personal jurisdiction is predicated on the commission of a tort within the state, of course the jurisdictional question involves some of the same issues as the merits of the case."). Indeed, the *content* of these conversations and documents will be *critical* to establishing "specific" personal jurisdiction. As a result, personal jurisdiction discovery and merits discovery must proceed together. Even if the two issues somehow could be divorced, given that the relevant witnesses reside throughout continental Europe, there is no legitimate reason to force Plaintiffs to incur the substantial expense of deposing these witnesses twice.⁶

Plaintiffs believe the most logical and economical course would be for the Court first to determine whether

jurisdiction depend upon, and are factually intertwined with, the merits. Plaintiffs allege both general and specific personal jurisdiction.

⁶ Pursuant to Rule 26(d), Plaintiffs already are entitled to begin taking seeking merits discovery in this case. Thus far, they have declined to do so in light of their pending motions.

there is any basis for removal jurisdiction in this case. Then, and only then, should discovery relating to personal jurisdiction and the merits commence.

II. Ruhrgas Does Not Need Discovery On Its Own Jurisdiction Contacts.

Aside from the fact that jurisdictional discovery will substantially overlap with the merits, the Court also should deny Ruhrgas' requested discovery because it is unnecessary and irrelevant. For instance, there is no reason to permit the *Defendant* to conduct discovery on personal jurisdiction issues in this case. The only issue relating to personal jurisdiction is Ruhrgas' contention that it is not [sic] does not possess sufficient contacts with Texas to subject it to personal jurisdiction here. Obviously, Ruhrgas already has knowledge of its own contacts with this state and considered that information before it filed its motion to dismiss for lack of personal jurisdiction.⁷ To the extent that Plaintiffs allege facts that also would support the exercise of personal jurisdiction over Ruhrgas, those facts must be presumed to be true. *E.g.*, *Wyatt v. Kaplan*, 686 F.2d 276, 280 (5th Cir. 1982). Either way, halting progress on the case ostensibly to permit Ruhrgas to conduct discovery on its *own* contacts with Texas would be a tremendous waste of time and money. Certainly there is no logical reason why the Court should

⁷ Indeed, the affidavits attached to Ruhrgas' Motion to Dismiss Under Fed. Rule 12(b)(2) may themselves evidence contacts sufficient to establish general personal jurisdiction in Texas.

stop all other discovery in the meantime while Ruhrgas conducts this quest.

III. Ruhrgas Is Not Entitled to Remove First, Then Ask Questions Later.

Ruhrgas' request to stay the case while it ostensibly "discovers" the basis for its removal is even more improper. Ruhrgas unilaterally removed this case to federal court, thereby wresting the action from Plaintiffs' chosen forum. In so doing, Ruhrgas was required by Federal Rule 11 and 28 U.S.C. § 1446 to have sufficient (and specific) legal and factual basis for doing so. If Ruhrgas did not have such a basis, that fact certainly is no reason to stay and allow discovery on the issue now.

Ruhrgas has been unable to cite a single decision at any level – let alone within the Fifth Circuit – supporting the notion that a defendant may remove a case and then halt that action's progress while the defendant goes in search of facts supporting removal. As is shown below, federal courts, including this Court, have held that a case which has been removed before the record confirms its removability should be remanded immediately with costs.

A. Ruhrgas' Request Fundamentally Misperceives the Removal Process.

Removal is a purely technical process for the transfer of cases between the state and federal courts. *Spencer v. New Orleans Levee Bd.*, 737 F.2d 435, 438 n.1 (5th Cir. 1984). A case can be removed if the plaintiffs' pleading confirms

the presence of either a federal question or complete diversity. Otherwise a case should proceed in the state forum, unless and until it appears that the case has "become removable." 28 U.S.C. § 1446(b); *see, e.g., Vasquez v. Alta Bonito Gravel Plant Corp.*, 56 F.3d 689, 690-91 n.1 (5th Cir. 1995) (presuming responses to interrogatories to be proper trigger for removal); *Roberson v. Orkin Exterminating Co., Inc.*, 770 F. Supp. 1324, 1328 (N.D. Ind. 1991) (holding that interrogatory responses may create basis for removal).

Given that a defendant must wait until a case has "become removable" before it can file a Notice of Removal pursuant to 28 U.S.C. § 1446(b), it comes as no surprise that Ruhrgas was unable to cite any authority endorsing its removal-first, ask-questions-later approach. In fact, just the opposite is true. *E.g., University of Tennessee v. USF&G*, 670 F. Supp. 1379, 1382 (E.D. Tenn. 1987) (resolving remand issue without "necessity of protracted and arguably endless discovery that could overshadow the real issues"). When a defendant has removed a case without already having the necessary support for removal, courts have *not* halted the case to permit the defendant to go in search of support for federal jurisdiction, simultaneously preventing any other discovery related to the merits from going forward. Instead, courts have imposed sanctions under Federal Rule 11, or simply remanded and awarded the plaintiff his costs under 28 U.S.C. § 1447(c). *E.g., News-Texan, Inc. v. City of Garland, Tex.*, 814 F.2d 216, 218-21 (5th Cir. 1987); *Davis v. Veslan Enters.*, 765 F.2d 494, 497-99 (5th Cir. 1985); *Mendez v. Plastofilm Indus., Inc.*, No. 91-C-8172, 1992 WL 80969 (N.D. Ill. Apr. 15, 1992) *Samuel v. Langham*, 780 F. Supp. 424, 428

(N.D. Tex. 1992).⁸ In fact, federal district courts can (and often do) remand to state court *sua sponte* and without notice where, as here, the removal papers reveal that removal jurisdiction is lacking. *E.g., News-Texan, Inc.*, 814 F.2d at 219 (affirming remand); *Liberty Mut. Ins. Co. v. Ward Trucking Corp.*, 48 F.2d 742, 750 (3d Cir. 1995) (refusing even to review district court's remand order issued without opportunity to respond).

B. Removal Jurisdiction is Limited and Should Be Resolved Summarily Based on the Facts at the Time of Removal.

Removal jurisdiction has been closely circumscribed and its availability is supposed to be resolved in a summary manner. *E.g., L.P. Comm. Corp.*, 870 F. Supp. at 746; *University of Tennessee*, 670 F. Supp. at 1382. The propriety of removal is not supposed to take precedence over the merits. It is simply improper to remove a case and then search for a basis for removal after a Motion to Remand has been filed. Notwithstanding the Defendant's desire to remove the action to federal court, Congress had made it quite clear that only certain cases may be removed, and even those cases cannot be removed until they have "become removable." Thus, the Fifth Circuit has repeatedly stressed that removal is a "matter of statutory construction," that removal statutes are "strictly construed

⁸ *See also International Shipping Co., S.A. v. Hydra Offshore, Inc.*, 875 F.2d 388, 390-92 (2d Cir. 1989) (affirming sanctions on plaintiff for urging federal jurisdiction where aliens were present on both sides of docket).

against removal,"⁹ and that, even where it is permissible to look beyond the plaintiff's pleading (such as in cases of a fraudulently joined defendant), the "inquiry is capable of summary determination." *Leffall v. Dallas Indep. School Dist.*, 28 F.3d 523, 524 (5th Cir. 1994); *Lackey v. ARCO*, 990 F.2d 202, 208 (5th Cir. 1993); *Green v. Amerada Hess Corp.*, 707 F.2d 201, 204-05 (5th Cir. 1983); *B. Inc. v. Miller Brewing Co.*, 663 F.2d 545, 550-551 (5th Cir. 1981); see also *Vasquez*, 56 F.3d at 692 (stressing that removal is purely question of statutory construction); *Garrett v. Commonwealth Mortg. Corp. of Am.*, 938 F.2d 591, 593 (5th Cir. 1991) (same).

Jurisdictional facts are assessed on the basis of the plaintiff's complaint and the defendant's Notice of Removal at the time of removal. *Burns*, 31 F.3d 1097 at n.13; *Hernandez v. Central Power & Light*, 880 F. Supp. 494, 496 (S.D. Tex. 1994); *L.P. Comm. Corp.*, 870 F. Supp. at 746; *Adler v. Adler*, 862 F. Supp. 70, 73 (S.D.N.Y. 1994). While the court may look to facts beyond those stated in the plaintiff's pleading to assess a claim of fraudulent joinder, it certainly is not required to do so. *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995). And, even then, the inquiry deliberately is a summary one, mirroring (at least in part) the procedure used at the summary judgment stage. E.g., *Ford v. Elsbury*, 32 F.3d 931, 935 (5th Cir. 1994); *Kliebert v. Upjohn Co.*, 915 F.2d 142, 146 (5th Cir. 1990) (noting that evidence of jurisdictional amount supporting removal must come directly from pleadings "or,

⁹ The "[d]efendant's right to remove and the plaintiff's right to choose his forum are not on equal footing." *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994).

at the most, from summary judgment-type evidence"); *Green v. Amerada Hess Corp.*, 707 F.2d 201, 204-05 (5th Cir. 1983) (finding error in district court's conducting evidentiary hearing); *B., Inc.*, 663 F.2d at 549 n.9.¹⁰ Thus, if the defendant has "facts" it hopes the court will consider, it should include them in the Notice of Removal.¹¹

A party who has removed a case *before* conducting discovery in state court or otherwise confirming the factual basis on which the case has supposedly "become removable" cannot at that point insist that the basis for the removal be shown after it has had a chance to conduct discovery in federal court. This is true even when the relevant facts must be shown by reference to material outside the plaintiff's petition. For example, cases originating in Texas state courts do not state damage claims

¹⁰ Many cases support the notion that removal and remand procedure is analogous to the disposition on a motion for summary judgment. E.g., *Ford v. Elsbury*, 32 F.3d 931, 935 (5th Cir. 1994); *Kliebert v. Upjohn Co.*, 915 F.2d 142, 146 (5th Cir. 1990) (noting that evidence jurisdictional amount supporting removal must come directly from pleadings "or, at the most, from summary judgment-type evidence"); *Green v. Amerada Hess Corp.*, 707 F.2d 201, 204-05 (5th Cir. 1983) (finding error in district court's conducting evidentiary hearing); *B., Inc.*, 663 F.2d at 549 n.9.

¹¹ The analogy to summary judgment practice is a helpful one. Few would argue that *after* a defendant has filed a motion for summary judgment, he is entitled to stop all activity in the case to conduct further discovery in support of his motion. Likewise, a removing defendant can no more ask for a "time out" at this point than a summary judgment proponent. *Thomashevsky v. Komori Printing Mach. Co., Ltd.*, 715 F. Supp. 1562, 1564 (S.D. Fla. 1989); see also *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1441-43 (5th Cir. 1993).

for specific amounts; thus, to remove such a case based on diversity, the amount in controversy must be proved by evidence outside the petition. Even in this context, however, the Fifth Circuit has held that such facts should be supplied by setting them forth "preferably in the removal petition, but sometimes by affidavit." *Eg., Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995).¹² Although providing an explicit list of "what types of proof are acceptable" to prove the amount in controversy, the Fifth Circuit significantly did *not* list the taking of post-removal discovery.

As Chief Judge Sear recently noted in remanding such an improvidently removed case:

As is true of the other jurisdictional requirements for removal, the amount in controversy is determined on the basis of the record as it existed at the time the defendant sought to remove the action. The party invoking the federal court's jurisdiction must show to a legal certainty that each plaintiff's claim is not less than the jurisdictional amount. The removing party bears this burden *regardless of the status of discovery, the number of plaintiffs, or any problems created by the state procedural statutes.*

Chouest v. American Airlines, Inc., 839 F. Supp. 412, 414 (E.D. La. 1993) (citations omitted, emphasis added); *see also Atkins v. Harcross Chem., Inc.*, 761 F. Supp. 444, 447

¹² The Allen court noted that post-petition affidavits are allowable only if relevant to jurisdictional facts at the time of removal. 63 F.3d at 1335.

(E.D. La. 1991) (refusing discovery to establish jurisdictional amount) (citing *Kliebert*, 915 F.2d at 146)); *Broadstone Realty Corp. v. Evans*, 213 F. Supp. 261, 267 (S.D.N.Y. 1962) (refusing plaintiff's request to conduct discovery related to removal jurisdiction); *cf. Hasse v. Sessions*, 835 F.2d 902, 908 (D.C. Cir. 1987) (refusing plaintiff's request for discovery to oppose motion to dismiss for lack of subject matter jurisdiction). Were it otherwise, every case filed in state court could be removed to federal court until federal jurisdiction was affirmatively disproved after discovery. In reality the presumption is exactly to the opposite. *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) ("there is a presumption against removal jurisdiction") (citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th cir. 1992)).

The removal statutes insist that the removing party place in its Notice of Removal a "short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). Because Congress presupposed that there would already be some basis for the removal and that the remand question would be determined on the basis of the materials on hand, it did not authorize any new substantive basis for the removal to be added outside the thirty-day period following the point at which the case "became removable." In fact, in keeping with the notion that the papers on hand should suffice, the statute that would permit amendment of the Notice of Removal to include any new grounds for removal has been strictly construed to forbid any changes of substance; only technical amendments are permitted. *Wyant v. National R.R. Pass. Corp.*, 881 F. Supp. 919, 924-25 (S.D.N.Y. 1995); *Zaini v. Shell Oil Co.*, 853 F. Supp. 960, 964 & n.2 (S.D. Tex. 1994); *Castle v. Laurel Creek*

Co., Inc., 848 F. Supp. 62, 64-65 (S.D. W. Va. 1994); *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 939 (E.D.N.Y. 1992) (Weinstein, J.); *Moody v. Commercial Ins. Co. of Newark, N.J.*, 753 F. Supp. 198, 200 (N.D. Tex. 1990); *Courtney v. Benedetto*, 627 F. Supp. 523, 527 (M.D. La. 1986); see also *Aetna Casualty & Sur. Co. v. Hillman*, 796 F.2d 770, 775 (5th Cir. 1986).

Congress also did not intend for the removal process to become an obstacle to the merits. As the Supreme Court observed in *United States v. Rice*: "Congress . . . established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the case was removed." 327 U.S. 742, 751 (1946). This is why Congress insisted that remand orders not be reviewed by appeal. *E.g., id.*; *Liberty Mut. Ins. Co. v. Ward Trucking Corp.*, 48 F.3d 742, 745 (3d Cir. 1995).

In sum, the remand issue should be resolved summarily on the strength (or weakness) of the claim of federal jurisdiction at the time of removal. It would be improper even to hold an evidentiary hearing. *Green v. Amerada Hess Corp.*, 707 F.2d 201, 204-05 (5th Cir. 1983). Ruhrgas' request that all progress in the case to cease so that it can take multiple depositions concerning removal plainly is not what Congress intended or what the Fifth Circuit had in mind when it warned that district court's should not pretry substantive factual issues in answering claims of fraudulent joinder. *E.g., id.* at 204.

C. Discovery Cannot Assist the Court on Any Issue.

Discovery in this case also could not further elucidate any of the bases for subject matter jurisdiction. The jurisdiction averments ultimately are questions of law. Even if the court were inclined to look beyond the pleadings in resolving the claims relating to arbitration and fraudulent joinder, and even if discovery in support of removal were available to retroactively support that removal, the discovery Ruhrgas currently is seeking could not assist the Court in ruling on the outstanding Motion to Remand. Thus, Ruhrgas' requested discovery should be denied. *Wyatt v. Kaplan*, 686 F.2d 276 (5th Cir. 1982) (Wisdom, J.); *Broadstone Realty*, 213 F. Supp. at 266-67.

Ruhrgas has asserted three bases for federal removal jurisdiction in this case:

federal question jurisdiction, the Convention on Recognition and Enforcement of Foreign Arbitral Awards, and diversity jurisdiction. Ruhrgas' requested discovery cannot help in establishing any of these bases.

1. Plaintiffs' Pleading Control the Federal Question Issue.

For example, the assertion that a federal question is present turns solely on the plaintiff's pleading. *E.g., Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Ruhrgas' arguments in support of a federal question based on the supposed existence of international comity issues are, as the Fifth Circuit has already held, "foreclosed by the familiar well-pleaded complaint rule." *Aquafaith Shipping Ltd. v. Jarillas*, 963 F.2d 806, 808 (5th Cir.), *cert. denied*, 113

S. Ct. 413 (1992); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1348 (S.D. Tex. 1995). None of the plaintiffs have stated any claims purporting to arise under the supposed federal common law of international relations. Thus, this issue could not be aided by any new factual discovery.

2. *The Convention Does Not Apply to this Case.*

Ruhrgas also claims that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act supports its removal. However, as the Supreme Court, the Fifth Circuit, and this court have repeatedly stressed, "arbitration is a matter of consent, not coercion." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1216 (1995). Thus, a party may be required to "submit to arbitration only if he has contracted to do so." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991). The Convention does not change this. *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 334 (5th Cir. 1987). To the contrary, by its own terms, the Convention does not apply (and thus does not provide an independent ground for removal) unless the parties have agreed in writing to submit the relevant claim to arbitration in a signatory nation. *E.g.*, *Sphere Drake Ins. PLC v. Marine Towing*, 16 F.3d 666, 669 (5th Cir.), *cert. denied*, 115 S. Ct. 195 (1994). In its Notice of Removal and Motion to Stay Pending Arbitration, Ruhrgas concedes that no such agreement exists. The Declaration of Lutz K. Eckert, which is attached to Ruhrgas' Notice of Removal, is unequivocal on the subject:

Ruhrgas has never entered into any agreement with any of the plaintiffs concerning gas produced from the Heimdal gas field or any matters which are the subject of the First Amended Petition filed by the plaintiffs in this action.

Ruhrgas has completely failed to explain how discovery, even if it were allowed, could possibly create a fact issue on questions relating to the Convention when its own filings have conclusively foreclosed any possibility that the Convention applies to this action.

3. *Fraudulent Joinder Factual Disputes Must Be Resolved in Plaintiffs' Favor.*

Lastly, Ruhrgas claims that it needs discovery to establish diversity jurisdiction in this case. It is undeniable that the presence of Marathon Norge (an alien) forecloses the possibility of complete diversity with Ruhrgas (also an alien). *E.g.*, *Zaini v. Shell Oil Co.*, 853 F. Supp. 961, 963 (S.D. Tex. 1994). Therefore, so long as Marathon Norge remains as a plaintiff, this case is not "removable" based on diversity. Ruhrgas' only asserted basis for diversity jurisdiction rests on the disfavored "fraudulent joinder" doctrine, which typically is used to challenge to the joinder of a nondiverse defendant. *Id.* at 964 (noting disfavored nature of claim and rule that "removal is construed restrictively so as to limit federal subject matter jurisdiction").

As Marathon Norge is the only nondiverse plaintiff, Ruhrgas should have attempted to dispose of Marathon Norge's claims in state court, and then, if successful in

that endeavor, removed the case once it "became removable." E.g., *WMW Machinery Co., Inc. v. Koerber AG*, 879 F. Supp. 16, 17 (S.D.N.Y. 1995). In any event, as is true generally, the existence of removal jurisdiction based on "fraudulent joinder" is determined by reference to the plaintiff's petition as of the time of removal. *Tenner v. Prudential Ins. Co. of Am.*, 872 F. Supp. 1571, 1572 (E.D. Tex. 1994). Only where the removing party pleads fraudulent joinder "with particularity" and comes forward with "clear and convincing evidence" that the plaintiff had no arguable basis at that time for believing that state law might impose liability may the party's citizenship be disregarded. *Parks v. New York Times Co.*, 308 F.2d 474, 478 (5th Cir. 1962); *Horton v. Scripto-Tokai Corp.*, 878 F. Supp. 902, 906 (S.D. Miss. 1995).

Marathon Norge's Managing Director already has attested to Marathon Norge's interest in this litigation. See Affidavit of Finn Engzelius (Ex. 1 to Plaintiffs' Motion to Remand). See also Plaintiffs' Brief in Support of Their Motion to Remand. Thus, even assuming that discovery could be available to support a previously filed notice of removal as an abstract matter, the discovery Ruhrgas seeks in this case could only produce, at best some conflict in the facts which would have to be resolved in favor of remand. *Burns*, 31 F.2d at 1095; *Lackey*, 990 F.2d at 207; *Horton v. Scripto-Tokai Corp.*, 878 F. Supp. 902, 906 (S.D. Miss. 1995) ("If there is any reasonable basis for predicting that the state law might impose liability, then the plaintiff must receive the benefit of the doubt and the cause must be remanded"); *L.P. Commercial Corp. v. Caudill*, 870 F. Supp. 743, 746-47 (S.D. Tex. 1994). To the extent Ruhrgas' proposed discovery seeks any new and substantially different basis for disregarding Marathon Norge,

which it does,¹³ consideration of this new theory would require amendment of the Notice of Removal. As noted above, such a substantive amendment is not permitted.

Conclusion

Plaintiffs believe the Court will conclude that this case must be remanded. The conclusion can (and should) turn on the record at the time Defendant filed in its Notice of Removal. Other issues (such as personal jurisdiction) will require substantial discovery that invariably will overlap with the merits. Accordingly, the Court should either stay everything until it rules on the remand issue, or simply permit discovery to proceed without restriction as provided in the Federal Rules.

¹³ For instance, the interrogatories to Marathon Norge inquire into corporate separateness, which is not raised at all in the Notice of Removal.

WHEREFORE, Plaintiffs respectfully urge the Court to deny Defendant's motion to stay all discovery in this case, as well as its request to permit it to take new discovery on its own personal and subject matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this document was served by mail on Defendant's attorneys of record in accordance with Federal Rule of Civil Procedure 5, on October 24, 1995.

/s/

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY,)	
MARATHON INTERNATIONAL)	
OIL COMPANY, AND MARATHON)	
PETROLEUM NORGE A/S,)	
Plaintiffs,)	
vs.	)	CIVIL ACTION
	)	NO. H-95-4176
RUHRGAS, A.G.,)	
Defendant.)	

MEMORANDUM AND ORDER

(Filed Nov. 16, 1995)

Pending before the Court are defendant Ruhrgas, A.G.'s ("Ruhrgas") Motion to Dismiss Under Fed. R. Civ. P. 12(b)(4) and (5) or to Quash Service of Process (Instrument #4), Motion to Seal Gas Sales Agreement (Instrument #10) and Motion for Order Staying Merits Discovery, Deferring Rule 26(f) Meeting and Rule 26(a) Initial Disclosures, and Authorizing Limited Discovery on Subject Matter Jurisdiction and Personal Jurisdiction Issues (Instrument #22) and plaintiffs Marathon Oil Company, Marathon International Oil Company, and Marathon Petroleum Norge A/S's (collectively "Marathon") Motion for Stay Pending Resolution of Their Motion to Remand (Instrument #14). Having reviewed the record in this case, the parties' submissions, and having considered the applicable law, the Court finds that Ruhrgas's motion to seal should be **GRANTED** and the other motions listed above should be **DENIED**.

The basis of the case is the development of the natural gas Heimdal Field ("the field") located in the Norwegian North Sea. The plaintiffs' affiliate MPCN entered into an agreement with Ruhrgas to sell its share of the gas from the field to Ruhrgas. The plaintiffs maintain that Ruhrgas and non-party Statoil conspired to have MPCN and the plaintiffs pay for the development of the field and then lock MPCN into the agreement which was not profitable. The plaintiffs claim that they have suffered losses due to the loans they made to MPCN as a result of Ruhrgas's conduct. The plaintiffs contend that Ruhrgas, by its actions with non-party Statoil, is liable to the plaintiffs for fraud, tortious interference with prospective business relationships, participation in breach of fiduciary duty, constructive fraud, and civil conspiracy.

Marathon filed this case in Texas state court on July 6, 1995. On August 21, 1995, Ruhrgas removed the case to federal court. The parties have filed several motions since the removal in late August. These includes, *inter alia* motions by Ruhrgas to stay pending arbitration, to dismiss for *forum non conveniens*, motion to dismiss for lack or [sic] personal jurisdiction and a motion to remand by Marathon. The Court has previously approved the parties' stipulation that responses to the motion to dismiss for lack of personal jurisdiction, motion to dismiss for *forum non conveniens*, and motion to remand shall not be due until December 1, 1995. See Instrument #19.

Motions Concerning Service

Marathon attempted to effect service, pursuant to Tex. Civ. Prac. & Rem. Code § 17.044, by serving the

petition on the Texas Secretary of State as Ruhrgas's agent for substitute service of process. Ruhrgas contends that Marathon was required by the Hague Convention (the Convention on service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361, T.I.A.S. No. 6638 (Nov. 15, 1965)) to serve it through the proper German central authority along with a version of their Original or First Amendment Petition translated into German. Therefore, Ruhrgas filed the instant motion to dismiss for insufficiency of process under Fed. R. Civ. P. 12(b)(4) and to dismiss for insufficiency of service of process under Fed.R.Civ.P. 12(b)(5), or, alternatively, to quash service of process.

In the exchange of filings made concerning this motion, the parties mainly dispute whether the Hague Convention even applies in this instance. On October 27, 1995, however, Marathon filed an Unopposed Motion to Appoint Special Agent for Service Under the Terms of the Hague Convention (Instrument #20), which the Court granted on October 29, 1995. *See* Instrument #21. At the Scheduling Conference held November 6, 1995, Marathon represented to the Court that a German translation of the complaint is currently at the central authority in Germany awaiting execution of service. In view of the current situation, the Court considers the instant motion to dismiss or to quash service to be moot. Accordingly, the Court will deny the motion as moot subject to being reurged by Ruhrgas should service under the Hague Convention not be effected within a reasonable time.

Motion to Seal Gas Sales Agreement

In support of its motion to remand and motion to stay pending arbitration, Ruhrgas attached a copy of the Heimdal Gas Sales Agreement ("the Sales Agreement" between Marathon Petroleum Company (Norway) ("MPCN"), Ruhrgas, and other entities. Ruhrgas filed the Sales Agreement (Instrument #3) under seal pursuant to the proposed sealing order. Marathon is adamantly opposed to the sealing of the Sales Agreement on the basis that the filing of the Sales Agreement by Ruhrgas gave rise to a presumption favoring public access. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

Marathon concedes, as it must, that the presumption of favoring public access is not absolute. *Id.* at 598-99. However, Marathon contends that Ruhrgas has not carried its burden to show that its interest in secrecy outweighs the presumption of public access to judicial documents. *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993).

In support of its motion to seal, Ruhrgas has provided affidavits which state that the Sales Agreement contains trade secrets and other confidential information concerning pricing formulas and "crucial elements of the delivery conditions." *See* Hoffmann Affidavit (Instrument #10, Exhibit A). The Fifth Circuit has indicated that information of this sort is a trade secret. *Metallurgical Indus., Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1199-1200 (5th Cir. 1986). Furthermore, the Sales Agreement itself contends a requirement that the information in it is confidential and is not to be improperly disclosed.

The Fifth Circuit has stated that "[i]n exercising its discretion to seal judicial records, the court must balance the public's common law right of access against the interests favoring nondisclosure." *S.E.C. v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993). In this case, the Court finds that there is little, if any, public interest in the Sales Agreement which would warrant the disclosure of its contents. When this is balanced with Ruhrgas's interest in preserving the confidentiality of the information in the Sales Agreement, the Court finds that Ruhrgas's motion to seal the Sales Agreement should be granted. In view of the Court's Memorandum and Recommendation denying Ruhrgas's motion to stay pending arbitration, it appears that there may no longer be any need to have the Sales Agreement on file with the Court. Thus, Ruhrgas shall be granted leave to withdraw the Sales Agreement now, or at a later time if appropriate.

Motions to Stay Discovery

Marathon has filed a motion seeking to stay all proceedings in this case pending the Court's ruling on Marathon's motion to remand. Marathon contends that this Court is without jurisdiction over the case, hence it should be remanded to Texas state court, and the Court should not rule on any of the other pending motions. Ruhrgas has filed a response in opposition (Instrument #23) to Marathon's motion to stay claiming that, in spite of the motion to remand, the Court has jurisdiction to rule on Ruhrgas's motion to dismiss for lack of personal jurisdiction. *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1494 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 690 (1994). Ruhrgas further contends that judicial

economy would not be promoted by staying the case pending a ruling on the motion to remand because the issues involved in the motion to remand are intertwined with the issues raised in Ruhrgas's motions to dismiss.

In spite of Ruhrgas's opposition to Marathon's motion to stay, Ruhrgas had filed a motion seeking to have the Court limit discovery to only subject matter and personal jurisdiction matters and stay all discovery in relation to the merits of the case. Marathon has filed a response in opposition (instrument #30). Marathon argues that Ruhrgas is not entitled to any discovery concerning the motion to remand because Ruhrgas should have known the basis for subject matter jurisdiction at the time it removed the case from Texas state court and Ruhrgas is not entitled to discovery on the personal jurisdiction issues because Ruhrgas should know what its contacts with Texas are without having to perform discovery. Marathon further contends that if its motion to stay pending a ruling on its motion to remand is denied, then full discovery should be permitted because of the overlap between jurisdictional discovery and merits discovery in this case.

To summarize the parties' positions, Marathon's ideal ruling is that this case be completely stayed pending resolution of the motion to remand; Ruhrgas's ideal ruling is to be allowed to pursue limited discovery on the jurisdictional issues; and Marathon's second choice is to be permitted to perform full discovery due to the interrelatedness of the jurisdictional and merits discovery. The Court is disinclined to stay the whole case pending resolution of the motion to remand. Judicial economy would be served by both limiting merits discovery pending the

resolution of the pending dispositive motions, and by allowing merits discovery related to discovery on the jurisdictional issues. Therefore, the Court concludes that both motions are granted and denied in part. Discovery is limited to the jurisdictional issues and any related merits discovery which should be performed simultaneously for reasons of judicial economy. The parties are expected, in good faith, to attempt to resolve, without judicial intervention, any gray areas.

In accordance with the foregoing, the Court

ORDERS that:

- (1) Ruhrgas's motion to dismiss for improper service or to quash service is **DENIED as moot**, subject to being reurged should service under the Hague Convention not be effected within thirty (30) days;
- (2) Ruhrgas's motion to seal the Sales Agreement is **GRANTED**;
- (3) the Clerk's Office shall maintain Instrument #3 under seal pending further order from the Court.
- (4) Ruhrgas is **GRANTED** leave to file a motion to withdraw the Sales Agreement;
- (5) Marathon's motion to stay is **GRANTED in part and DENIED in part**; and
- (6) Ruhrgas's motion for order deferring Rule 26(f) meeting and Rule 26(a) initial disclosures is **GRANTED**; Ruhrgas's motion for order authorizing limited discovery on subject matter jurisdiction and personal jurisdiction issues is **GRANTED in part and DENIED in part**; and

Ruhrgas's motion for order staying merits discovery is **GRANTED in part and DENIED in part**.

With respect to orders (5) and (6), discovery is limited to jurisdictional issues and any related merits discovery, which should be performed simultaneously for reasons of judicial economy. The parties are **ORDERED** to attempt, in good faith, to resolve, without judicial intervention, any gray areas between discovery on jurisdictional issues and related merits issues.

The Court further

ORDERS that discovery on jurisdictional issues shall be completed within sixty (60) days of the date of entry of this Order; and

ORDERS that submission dates for the motion to dismiss for lack of personal jurisdiction (Instrument #4), motion to dismiss for *forum non conveniens* (Instrument #8), and motion to remand (Instrument #12) shall be ten (10) days after the conclusion of the jurisdictional discovery.

SIGNED at Houston, Texas, this 15th day of November 1995.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY,	§	
MARATHON INTERNATIONAL	§	
OIL COMPANY, and MARATHON	§	
PETROLEUM NORGE A/S,	§	
	§	
Plaintiffs,	§	CIVIL ACTION
	§	NO. H-95-4176
VS.	§	
	§	
RUHRGAS, A.G.,	§	
	§	
Defendant.	§	

ORDER

(Filed Jan. 12, 1996)

The Court has considered Plaintiffs' Amended Motion for Extension of Deadlines and Ruhrgas AG's Response thereto and makes the following modifications to the deadlines established by the Court's Order signed November 15, 1995 (Instrument No. 36):

1. Discovery on all personal jurisdiction and related issues must be completed by January 26, 1996.
2. The submission date for Defendant's Motion to Dismiss for lack of personal jurisdiction (Instrument No. 4), Defendant's Motion to Dismiss on *Forum Non Conveniens* Grounds (Instrument No. 8), and Plaintiffs' Motion to Remand (Instrument No. 12) shall be February 8, 1996.

SIGNED this 11th day of January, 1996.

/s/ Melinda Harmon
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY,	§	
MARATHON INTERNATIONAL	§	
OIL COMPANY, AND MARATHON	§	
PETROLEUM NORGE A/S,	§	
	§	
Plaintiffs,	§	
	§	Civil Action
v.	§	No. H-95-4176
	§	
RUHRGAS, A.G.,	§	
	§	
Defendant.	§	

**MOTION FOR LEAVE TO FILE
BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY
AS AMICUS CURIAE IN SUPPORT OF RUHRGAS**

The Federal Republic of Germany moves for leave to file an amicus brief, lodged herewith, in support of the position of Ruhrgas, A.G., in this case.

Respectfully submitted,

/s/ Thomas G. Corcoran Jr.
Peter Heidenberger
Thomas G. Corcoran Jr.
Berliner, Corcoran & Rowe
1101 Seventeenth Street, N.W.
Suite 1100
Washington, D. C. 20036
(202) 293-5555

January 15, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY,	§	
MARATHON INTERNATIONAL	§	
OIL COMPANY, AND MARATHON	§	
PETROLEUM NORGE A/S,	§	
Plaintiffs,	§	
	§	Civil Action
v.	§	No. H-95-4176
	§	
RUHRGAS, A.G.,	§	
	§	
Defendant.	§	

MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF
FOR THE FEDERAL REPUBLIC OF GERMANY AS
AMICUS CURIAE IN SUPPORT OF RUHRGAS

On January 12, 1995, counsel for the Federal Republic of Germany, Peter Heidenberger, telephoned counsel for the plaintiffs, Clifton Hutchinson, and asked his consent to the filing of an amicus brief by Germany. Consent was refused. In consequence a written request was sent by FAX that same day. A copy is attached hereto as Exhibit 1. A reply dated January 12, but FAXed on January 15, sets out the reasons for plaintiffs' objections to Germany's proposed filing. The reply is attached as Exhibit 2.

While we recognize that the filing of the brief will impose on plaintiff the obligation to respond to Germany's arguments and add to time pressure on plaintiffs' counsel, that would be true whenever Germany chose to file. Germany's counsel assure the Court that Mr. Hutchinson was called as soon as the brief was near

completion. January 19, 1995, a week before the January 25, 1995, date for completion of briefing by the parties was chosen purposely so that plaintiffs would have an opportunity to respond to Germany's arguments. Finally, because plaintiffs' counsel have brought their time difficulties to our attention, we have cut short our process of review, scheduled to be completed early on the week of January 15, 1996, and FAXed a copy of the amicus brief to plaintiffs' counsel on January 15, 1996.

Respectfully submitted,

/s/ Thomas G. Corcoran Jr.
Peter Heidenberger
Thomas G. Corcoran Jr.
Berliner, Corcoran & Rowe
1101 Seventeenth Street, N.W.
Suite 1100
Washington, D. C. 20036
(202) 293-5555

January 15, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY,	§	
MARATHON INTERNATIONAL	§	
OIL COMPANY, AND	§	
MARATHON PETROLEUM	§	Civil Action
NORGE A/S,	§	No. H-95-4176
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
RUHRGAS, A.G.,	§	
	§	
Defendant.	§	

**BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY
AS AMICUS CURIAE IN SUPPORT OF RUHRGAS**

I. Interest of the Amicus Curiae

The Federal Republic of Germany has a vital national interest in securing an adequate and uninterrupted supply of natural gas at competitive market prices. The instant case threatens this vital national interest in two ways. First, plaintiffs have brought this case in a local rather than a federal tribunal although the case manifestly presents substantial issues of international law and foreign relations. Second, plaintiffs have attempted to circumvent the arbitration clause in the agreements to which their affiliate is a party although the clause clearly covers the controversy presented by this case. The clause requires arbitration in Europe where the controversy arose. In the view of the Federal Republic of Germany, this Court should take subject-matter jurisdiction over

this case and stay or dismiss the case in favor of arbitration or litigation in Europe to ensure that adverse consequences for international relations do not result.

II. Statement of the Case

Plaintiffs filed this action in the 152d Judicial District Court of Harris County, Texas. Upon motion by the Defendant, Ruhrgas, A.G. (hereinafter "Ruhrgas"), the case was removed to this Court. Plaintiffs, Marathon Oil company and certain of its affiliates (hereinafter sometimes "Marathon"), filed a motion to remand the case to Texas state court. Ruhrgas opposed the motion to remand asserting that the Court had subject-matter jurisdiction over this case, and moved for a stay pending arbitration, or for dismissal on the grounds of *forum non conveniens* or lack of personal jurisdiction. The Court denied Ruhrgas' motion for a stay pending arbitration and permitted discovery on certain jurisdictional issues. Memoranda and Orders entered November 17, 1995 and January 3, 1996. Ruhrgas' motion for reconsideration of the order denying stay pending arbitration and its motions to dismiss on various grounds as well as Marathon's motion to remand are now pending for decision by the Court.

III. The First Amended Petition and the Note Verbale

A. The First Amended Petition

Although many of the allegations of the First Amended Petition are hotly contested, we summarize them here to show that even accepting every well-pleaded allegation in the petition, the Court has subject-matter jurisdiction, and the case should be stayed or

dismissed in favor of arbitration in a European forum. Material in parenthesis is not in the petition but otherwise supported by the record.

According to the First Amended Petition, this case "arises out of" a conspiracy among Ruhrgas, a company controlling 80% of the German market for natural gas, Statoil, the state oil and gas company of the Kingdom of Norway, and others, including Distrigaz, the state gas company of the Kingdom of Belgium, to monopolize the Western European market for natural gas. ¶¶ 6, 9, 11, and 27. A natural resource is involved, the Heimdal gas field, which is located in Norway's portion of the European continental shelf. ¶ 14. Through Statoil, Norway, with a 40% share, is the largest equity owner of the field; the second largest, with a 24% share, is Marathon. ¶¶ 14-15.

Plaintiffs are Marathon Oil Company, and certain of its subsidiaries, but not the Marathon subsidiary, Marathon Petroleum Company (Norway) ("MPCN"), that actually has a contract with Ruhrgas and other European parties to deliver natural gas from the Heimdal gas field to Western Europe (and that by way of assignment from plaintiff Marathon Petroleum Norge A/S enjoys all rights and performs all duties under the Heimdal license). ¶¶ 1-3. MPCN is referred to in the complaint only as one of Marathon's "affiliates." ¶¶ 26, 29, 32. Neither Statoil, Distrigaz, the Kingdom of Norway, nor the Kingdom of Belgium, are named as defendants.

The first misrepresentation alleged in the petition is a promise by Statoil (not Ruhrgas) that the cost of the construction of a new, (majority state-owned), pipeline, referred to only as "Statpipe," could be recouped by

Marathon by means of a transportation charge of "tariff" on all gas flowing through the pipeline. ¶¶ 17-18. Statoil then brought Marathon and its co-venturers (evidently including Statoil) together with a consortium headed by Ruhrgas, which agreed to pay the venturers a formula then yielding \$6.16 per mcf for the gas. ¶ 19. This agreement is the only alleged representation by Ruhrgas to Marathon that the petition describes explicitly. Based on this representation and others that are never described, Marathon allegedly advanced over \$300 million for the development of the Heimdal field. ¶ 21.

At some point during the foregoing, Statoil discovered the Troll field, which was some 40 times larger than Heimdal. ¶ 22. Statoil agreed to commit the Troll gas to Ruhrgas at \$2.201 per mcf and Statoil also committed to lower the Heimdal price to Ruhrgas. ¶ 23. MPCN (however, refused to go along and when a dispute as to the validity of the supply contract between MPCN and other Continental buyers arose) initiated arbitration and was successful as against Ruhrgas (and other buyers) but not against Distrigaz, the Belgian state gas company. Eventually as a result of what plaintiffs' claim to be Ruhrgas' economic coercion, they claim that MPCN had to agree to an amendment of its agreement with Ruhrgas. ¶¶ 24-29.

Although § 30 of the Petition is difficult to understand, it seems to say that in the course of renegotiating the agreement with Ruhrgas and the other European buyers, Statoil (not Ruhrgas) misrepresented that it would route the gas from the Troll field through Statpipe (the majority state-owned pipeline of the Kingdom of Norway) with the result that the tariff on Heimdal gas would decrease. ¶ 30. Early in 1995, however, Statoil

announced that it would not connect the Troll field to Statpipe. ¶ 32. But for Statoil's "misrepresentations to Marathon regarding increased shipments of gas through Statpipe and the related cost reductions," the factual portion of the Petition concludes, "[p]laintiffs would have filed this action years ago." *Id.*

B. Germany's Note Verbale

The Federal Republic of Germany submitted its Note Verbale No. 75/95 to the United States Department of State on December 15, 1995. A copy of the note is attached hereto as Exhibit 1.

The note Verbale states in pertinent part that Germany has a strong public interest in secure and reasonably priced energy supplies. Because natural gas provides a substantial proportion of Germany's energy supplies and 80% of the gas must be imported, natural gas imports are a major issue in national energy policy. Imports from Norway are particularly important. The governments of Germany and Norway concluded bilateral treaties in 1974 and 1993 to define the sovereign powers of the two states with regard to the pipelines from the Norwegian continental shelf to the German coast. The United States has historically taken a keen interest in the energy supply situation in Europe and encouraged the development of Norway's North Sea fields as an alternative to Soviet gas. ¶¶ 4-8.

The Note Verbale further states that the United States and Germany are parties to a number of treaties implicated in the case filed by Marathon, in particular the so-

called New York Convention¹ concerning the recognition and enforcement of foreign arbitral awards. If the legal opinion came to prevail that in international trade a party to a contract can avoid binding contractual agreements, such as, in this case, prices and the arbitration clause, by having affiliated companies that are not signatories to these contractual agreements file an action for damages in a forum non conveniens and if such forum were to rule on the merits of the case, the reliability of the international legal and commercial relations would be gravely affected. ¶¶ 10-13.

IV. Summary of Argument

Because of the critical national interest of Germany and many other European countries that are implicated in this case, weighty issues of foreign relations are presented on the face of the First Amended Petition. For this reason, this case "arises under" the Laws of the United States and this Court, that is, a federal court has subject-matter jurisdiction.

The Supreme Court has commanded that arbitration should be compelled unless the Court can be positive that the arbitration clause does not cover the dispute. This Court has already ruled that the claims in question are within the scope of the broad arbitration clause contained in the agreement. Plaintiffs nevertheless argue that they

¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C. § 201 note (West Supp. 1995) and 9 U.S.C. §§ 3 and 208.

are not bound because they are not signatories. In view of Marathon Oil's control over the subsidiary, MPCN, that is bound by the arbitration agreement and of Marathon Oil's involvement in the proceedings that led to this case, the arbitration clause should be interpreted to bind the plaintiffs.

In view of all the factors to be weighed in deciding whether this Court is a *forum non conveniens*, in particular, that most of the evidence is located in Europe, and that the law of Norway will be applied, the case should be dismissed in favor of refileing in a European forum, either arbitral or national.

Finally, because Ruhrgas has had so little contact with Texas, it would be fundamentally unfair to require it to litigate here, so the case should be dismissed for lack of personal jurisdiction.

V. Argument

The Federal Republic of Germany supports Ruhrgas' opposition to plaintiffs' motion to remand. Germany also supports Ruhrgas' dispositive motions in this case, in particular, its motion for reconsideration of order denying motion for stay pending arbitration. Plaintiffs should not be allowed to avoid both federal jurisdiction and arbitration by the subterfuge of proffering themselves rather than MPCN as the party in interest.

A. This Court has federal question jurisdiction over this case because the necessity for the resolution of many issues of federal law appears on the face of the well-pleaded complaint.

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, law, or treaties of the United States." 28 U.S.C. § 1331. A case "arises under" § 1331 when it is brought to enforce a right of action created by state law, where the vindication of a right under state law "necessarily" turns on some construction of federal law. *Franchise Tax Board v. Laborers Vac. Trust*, 463 U.S. 1, 9 (1983), citing *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). One distinguished commentator has restated the *Franchise Tax Board* test as follows:

A case . . . "arises under" federal law . . . if it is brought to enforce a right of action created by state law, if under orderly rules of pleading and proof the plaintiff, as part of his case in chief, must establish the correctness and applicability of a proposition of federal law in order to prevail.

Hart & Wechsler, *The Federal Courts and the Federal System*, (3rd. Ed., 1988), p. 995. It is well-established that the federal issue must be "substantial." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813 (1986).

Although for a period in Constitutional history, the exclusively federal nature of international law was not established, "all that . . . changed when the Supreme Court decided [*Banco Nacional de Cuba v. Sabbatino*, 376

U.S. 398 (1964)]." L. Henkin, *Foreign Affairs and the Constitution*, (The Foundation Press, 1972), p. 217. In *Sabbatino*, the Supreme Court held that, due to the significance of choices ordering the United States' relationships with other members of the international community, such issues "must be treated *exclusively* as an aspect of federal law." *Id.*, at 425, emphasis supplied. Although *Sabbatino* dealt only with the "act of state doctrine," it is now apparent that claims raising questions of foreign relations present issues of federal common law. See *Texas Indus., Inc. v. Radcliff Materials*, 451 U.S. 630, 640 (1981); *Republic of Philippines v. Marcos*, 806 F.2d 344, 352-354 (2d Cir. 1986), cert. dismissed, 480 U.S. 942 (1987); *Sequiha v. Texaco, Inc.*, 847 F.Supp. 61, 62-63 (S.D. Tex. 1994); *Kern v. Jeppsens Sanderson, Inc.*, 867 F.Supp. 525, 531-532 (S.D. Tex. 1994).

In *Radcliff Materials*, the Supreme Court stated that although there was no general common law, citing *Erie v. Tompkins*, 304 U.S. 64, 78 (1938), the Court had recognized the need and the authority to formulate federal common law in two areas. The first of these was where a federal rule of decision was necessary to protect uniquely federal interests, in particular, "international disputes implicating . . . our relations with foreign nations," *Radcliff Materials*, at 641. In such instances, the Court said:

. . . our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

Id., at 640-641.

In *Marcos*, the Second Circuit held that there was federal question jurisdiction over actions having important foreign policy implications, citing the Supreme Court in *Merrell Dow, supra*, at 810, to the effect that in "close" cases the federal court should assume jurisdiction where the federal foreign relations interest was sufficiently important. *Marcos* at 353. The Court noted that in some areas of law, federal law was so powerful as to preempt entirely any state cause of action. The Court ruled that the federal common law in the area of foreign affairs was "probably" sufficiently powerful to displace the state cause of action presented in that case. Federal jurisdiction was present in any event because the claim raised, as a necessary element, the question whether to honor the request of a foreign government that the American courts enforce the foreign government's directives to freeze property in the United States subject to future process in the foreign state. *Marcos* at 354.

In *Sequiha*, residents of Ecuador asserted a variety of causes of action in this Court arising out of pollution accompanying petroleum development in that country. Chief Judge Black noted that the conduct in question was regulated by the Republic of Ecuador, which owned the land in issue and treated all petroleum exploration as a public utility controlled by the government. He also noted that the Government of Ecuador had officially protested the litigation, as the Federal Republic of Germany has in its Note Verbale of December 15, 1995. The Court held that such matters affected international law and the relationship between the United States and foreign governments and gave rise to federal question jurisdiction. *Sequiha* at 62.

The *Sequiha* court dismissed the case on the basis of the comity of nations and the doctrine of *forum non conveniens*. The Court noted that under the doctrine of comity a court should decline to exercise jurisdiction under certain circumstances in deference to the laws and interest of a foreign country. Because, among other things, the challenged activity and alleged harm had occurred entirely in Ecuador, the challenged activity was regulated by the Republic of Ecuador, the exercise of jurisdiction would interfere with Ecuador's sovereign right to control its own environment and resources, and the Republic of Ecuador had expressed its strenuous objection to the exercise of jurisdiction by the Court, the case was dismissed under the doctrine of the comity of nations. *Id.* at 63. The Court also dismissed on the basis of *forum non conveniens*. *Id.* at 63-65.

In *Kern*, Chief Judge Black again addressed whether the Court had subject-matter jurisdiction over a controversy involving foreign states and acts taking place in foreign countries. In that case air crashes took place in Nepal involving aircraft built by Airbus Industrie, a company which is majority owned by foreign sovereigns. The Court ruled that there was federal question jurisdiction in the case because the resolution of plaintiffs' state law claims depended on the interpretation of certain United States treaties. Alternatively, the Court held that there was also federal question jurisdiction because plaintiffs' claims raised questions of foreign relations which were incorporated into federal common law. "The fact that foreign countries [were] not specifically named in the lawsuit [was] immaterial." "Since the interests of foreign countries in the litigation are substantial," this Court

concluded, "there was federal question jurisdiction." *Kern*, 867 F.Supp. at 531-532.

As explained at length in the Note Verbale it is entirely clear, using Chief Judge Black's formulation of the standard in *Kern, supra*, that the interests of the Federal Republic of Germany in this litigation are substantial. It is equally clear, as the Supreme Court put it in *Radcliff Materials*, that this case presents an international dispute "implicating . . . our relations with foreign nations." *Id.* at 641.

The first substantial interest is Germany's interest in secure and reasonably priced energy supplies. Note Verbale, paras. 3-8. A state, 80% of whose natural gas is imported, must view the security of its gas supply as an important concern. The elaborate legal system fashioned by the producing and consuming European states to address this problem is testimony to its importance. Note Verbale, paras. 10-14.

Second, the Court can take judicial notice that this case presents delicate problems of foreign relations with the Kingdom of Norway. Because decisions of the case will call into question decisions of the Kingdom of Norway, made by its state-owned oil company, Statoil, and state-owned pipeline, Statpipe, within its territorial boundaries, the foreign relations problems that led to the creation of the act of state doctrine are implicated. *See, Sabbatino*.

Third, the issue whether Marathon may escape international arbitration takes on a different coloration when viewed as implicating the relations of the United States with foreign nations. It is well established that the mere

existence of an issue whether the New York Convention applies, does not confer federal question jurisdiction. *Prudential-Bache Securities, Inc. v. Fitch*, 966 F.2d 981, 989 (5th Cir. 1992). When viewed, however, as an issue in United States foreign relations with Europe, it is a candidate for the "substantial federal issue" required for subject-matter jurisdiction. Because as set out in the Note Verbale, it is the custom of European countries, in particular the Federal Republic of Germany and the Kingdom of Norway, to resolve issues concerning natural gas contracts via arbitration, interference by a United States court in this process does, we respectfully submit, raise a significant issue of foreign relations and as a result provides subject-matter jurisdiction in this case.

Because all of the foregoing issues of foreign relations appear on the face of the First Amended Petition and require the Court to resolve substantial issues of federal law, this Court has subject-matter jurisdiction.

B. The New York Convention requires that this dispute be submitted to arbitration.

The Federal Republic of Germany respectfully submits that this Court should grant Ruhrgas' motion for reconsideration of its order denying motion for stay pending arbitration. The Court denied Ruhrgas motion for stay on the ground that the plaintiffs themselves had not consented to arbitration and that they were not obligated to arbitrate as a result of their relationship with MPCN. November 17, 1995, Memorandum and Order, Instrument #38, pp. 4-11.

We respectfully submit, however, that the affidavits and correspondence submitted by Ruhrgas and the deposition testimony of plaintiffs' employees, John Alvins Evans and Burton Bossley,² support Ruhrgas' position that MPCN was controlled by the plaintiffs, Marathon Oil Company (MOC) and its subsidiary Marathon International Oil Company (MIOC). MOC and MIOC owned the stock of MPCN and controlled the negotiations leading to the agreement signed by MPCN to develop the Heimdal filed [sic] that included the arbitration clause. There is no indication in the record that MPCN had employees of its own. Such employees were not necessary because negotiations and supervision were performed by employees of the plaintiffs. Employees of MOC and MIOC stated in affidavits that they were members of the MOC team which conducted the negotiations and that they executed the agreements for the exploration of the Heimdal field on behalf of MPCN. Evans Deposition, pp. 6-8, 24-33; Bossley Deposition, pp. 15-33.

All decisions concerning the development of the gas fields were made by the parent corporation. Whenever a new area was to be explored, a geographical subsidiary would be set up, such as Marathon France, Marathon Germany, or, as in the instant case, Marathon Norway. The subsidiaries required few or no employees, because all of the work was done by employees of the plaintiffs who were then assigned to the respective subsidiary to perform such tasks as directed by the plaintiffs. Evans Deposition, pp. 24-33.

² Exhibits 2 and 6 to Ruhrgas' Motion for Reconsideration.

In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), the Supreme Court ruled that an agreement by the parties to arbitrate any dispute arising out of their international commercial transaction was to be enforced in accordance with the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, in a case involving securities fraud. The Court did so although in *Wilko v. Swann*, 346 U.S. 346 (1953), it had refused to enforce the arbitration clause in another case involving securities fraud where the dispute was not international. In *United Steelworkers v. American v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583, (1960), the Court said that arbitration must be compelled unless the court can say with "positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute." In short, there is a "liberal federal policy favoring arbitration agreements," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), especially in cases involving international commerce.

The New York Convention, *supra*, states in pertinent part that "[i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement. . . ." 9 U.S.C. § 3. The United States statute that puts the New York Convention into effect provides that "[w]here the

subject matter of an action or proceeding pending in a State court *relates* to an arbitration agreement or award falling under the Convention, the defendant . . . may . . . remove such action or proceeding" to federal court. 9 U.S.C. § 205, emphasis supplied.

We ask the Court to note at this point that the only alleged misrepresentation by Ruhrgas that is explicitly set out in the petition is the representation embodied in the agreement that Ruhrgas would pay for Heimdal gas based on a formula then yielding \$6.16 mcf. First Amended Petition, ¶ 21. The alleged breach of that agreement has already been a subject of arbitration. § 24-29. Though phrased in tort rather than breach of contract terms, the injury alleged in this case is economically the same injury that was the subject of the arbitration described in the petition. Marathon and its affiliates claims that they advanced money to develop the Heimdal field on the representation, embodied in the agreement, that they would be compensated by the \$6.16 formula. The measure of damages, whether the cause of action is expressed as a tort or a breach of contract, can only be the difference between what the agreement promised Marathon and what Marathon has received or will receive. This precise issue has already been decided by arbitration. First Amended Petition, ¶ 26. It follows that the cause of action set out in the petition "relates," as 9 U.S.C. § 205 states, to the arbitration. It relates because the underlying injury is identical.

The issue presented is best characterized not as whether plaintiffs have agreed to submit any claim against Ruhrgas to arbitration, but whether under the circumstances of this case, the plaintiffs as affiliates of

MPCN are bound by the arbitration clause agreed to by MPCN.

As Ruhrgas has accurately pointed out to the Court:

The coverage of the arbitration clause set out in Article 15 of the Agreement is very broad, covering "[a]ll claims, disputes, and other matters arising out of or relating to this Agreement. . . ." The Fifth Circuit has stated that when the parties agree to such a broad clause, "they intend their clause to reach all aspects of the relationship." *Valentine Sugar Inc. v. Donau Corp.*, 981 F.2d 210, 213 n.2 (5th Cir. 1993), *cert. denied*, 113 S.Ct. 3039 (1993). Such a broad clause covers not only contract claims, but tort claims which "arise out of the business relationship between the opposing parties." *Snap-On tools Corp. v. Mason*, 18 F.3d 1262, 1265 (5th Cir. 1994).

Ruhrgas Memorandum in Support of Motion for Stay Pending Arbitration, p. 6. There can be no doubt that the issues placed in dispute by the plaintiffs in this case arise out of the same business relationship as the issue of the price to be paid for gas from the Heimdal field that has already been the subject of arbitration between MPCN and the Consortium. This Court has so ruled. Memorandum and Order entered November 17, 1995, Instrument #38, p. 4, n. 3.

Marathon's response to this argument is that only its affiliate, MPCN, not Marathon Oil or any of the other named plaintiffs, signed the agreement with the arbitration clause. Marathon's Response to Ruhrgas' Motion to Stay Arbitration, pp. 3-12. However, as Ruhrgas replied, Ruhrgas Motion for Reconsideration, pp. 6-14, citing *Dow Chemical v. Isover Saint Gobain*, Cour d'Appel, Paris, 21

October 1983, 110 J.899 (1983) IX Yearbook 131 (1984), a precedent under the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC") in Paris, where a parent company has exercised control over a subsidiary having signed the relevant contract or participated in its negotiation, performance, and/or termination, the whole group of companies is bound by the arbitration clause in the agreement. *Dow Chemical* is one of a line of awards rendered by arbitral tribunals acting under the auspices of the ICC that have come to this conclusion. See ICC matter No. 1434, award of 1975, 103 J. du Droit Int'l 978-980 (1976); ICC matter no. 2375, award of 1975, 103 J. du Droit Int'l 973-974 (1976); see also ICC matter no. 3493, award of March 11, 1983, 22 I.L.M. 752, 761-67 (1983); ICC matter no. 5103, award of 1988, 115 J. du Droit Int'l 1205 (1988); ICC matter no. 5730, award of 1988, 117 J. du Droit Int'l 1029 (1990); ICC matter no. 6519, award of 1991, 118 J. du Droit Int'l 1065 (1991). Precedent from arbitration under the auspices of the ICC should be given great weight in this case because the arbitration clause in issue specifies that arbitration will be governed by the ICC rules. As a consequence, pursuant to the arbitration clause in Article 15 of the agreement between Ruhrgas and MPCN, the issues presented by the instant case are also required to be submitted for arbitration.

C. This Court should dismiss on the ground of forum non conveniens in favor of a European forum.

Germany has little to add to the argument made by Ruhrgas in its motion to dismiss on the ground of *forum*

non conveniens, except to say that there clearly are adequate and more convenient forums in Europe, and since Marathon's affiliate has agreed to ICC arbitration in Sweden, and Sweden is a neutral forum as among United States, German, and Norwegian litigants, arbitration in Sweden may be the most favored location to resolve this dispute.

D. Alternatively, the Court should dismiss for lack of personal jurisdiction.

Germany also has little to add to the arguments made by Ruhrgas in its motion to dismiss for lack of personal jurisdiction. Germany supports that motion. Germany suggests in addition only that the lack of contacts between Ruhrgas and the United States would also support dismissal on the ground of *forum non conveniens* to allow resolution of this dispute in a European forum, whether arbitral or national.

CONCLUSION

For the foregoing reasons, the motion to remand should be denied. The case should then be stayed pending arbitration or dismissed on the ground of *forum non conveniens* or for lack of personal jurisdiction.

Respectfully submitted,

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January 19, 1996

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

MARATHON OIL COMPANY,)	
MARATHON INTERNATIONAL)	
OIL COMPANY, AND MARATHON)	
PETROLEUM NORGE A/S,)	
Plaintiffs,)	
	)	CIVIL
vs.	)	ACTION
RUHRGAS, A.G.,	)	NO. H-95-4176
)	
Defendant.)	

ORDER

(Filed Jan. 26, 1996)

Pending before the Court is the Federal Republic of Germany's Motion for Leave to File Brief for the Federal Republic of Germany as Amicus Curiae in Support of Ruhrgas (Instrument #58). The Court is aware that the Marathon plaintiffs are opposed to this motion as apparent from the plaintiffs' counsel's letter to the movant's counsel dated January 12, 1996. The plaintiffs' main reason for opposing the filing of the amicus brief is the time restraint in filing a response to the movant's brief.

The pending jurisdictional motions are to be submitted to the Court for consideration on February 8, 1996. The movant herein has attached its amicus brief to the instant motion. The Court finds that leave to file an amicus brief should be granted and plaintiffs should be given until February 8, 1996 to file any response thereto, if necessary. Therefore, the Court

ORDERS that the Federal Republic of Germany is **GRANTED** leave to file an amicus brief in this action; and further

ORDERS that the plaintiffs shall have until February 8, 1996 to file any response to the amicus brief.

SIGNED at Houston, Texas, this 24th day of January 1996.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

NO. H-95-4176
IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY, and
MARATHON PETROLEUM NORGE A/S

Plaintiffs,

vs.

RUHRGAS, A.G.

Defendant.

PLAINTIFFS' RESPONSE TO RUHRGAS,
A.G.'S MOTION TO DISMISS FOR
LACK OF PERSONAL JURISDICTION

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

MARATHON OIL	§	
COMPANY, MARATHON	§	
INTERNATIONAL OIL	§	
COMPANY, and	§	
MARATHON	§	
PETROLEUM NORGE	§	
A/S,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
RUHRGAS, A.G.,	§	
	§	
Defendant.	§	

**CIVIL ACTION NO.
H-95-4176**

PLAINTIFFS' RESPONSE TO RUHRGAS AG'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Subject to their previously filed motion to remand, Plaintiffs file the following response to Defendant Ruhrgas' motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule 12(b)(2).

SUMMARY OF ARGUMENT

There is no basis for Ruhrgas' assertion that it is not subject to personal jurisdiction in Texas. To the contrary, volumes of evidence plainly show that this Court could exercise both specific and general jurisdiction over Ruhrgas, assuming subject matter jurisdiction also existed.¹ Representatives of Ruhrgas traveled to Houston, Texas on at least three occasions to discuss matters relating to the Heimdal field with representatives of the Plaintiffs. This fact alone is sufficient to establish specific jurisdiction over Ruhrgas, given that Plaintiffs' claims concern their on-going investment in the Heimdal field. Ruhrgas also sent numerous faxes, telexes and letters to Plaintiffs in Houston, and directed many phone calls to them here as well. Finally, Ruhrgas' fraudulent conduct was aimed at MOC and MIOC in Texas, and foreseeably injured those plaintiffs in Houston, Texas. Plainly, there is sufficient evidence for the Court to exercise specific jurisdiction over Ruhrgas in this case.

Even ignoring Ruhrgas' substantial specific jurisdictional contacts with Texas, the evidence also establishes that Ruhrgas is present in Texas (and in Houston) on a continuous and systematic basis such that it should reasonably expect that it might be haled into a Texas court. For example, Ruhrgas has maintained employees in Houston *every day* since at least 1994, and on a continuous basis since 1992. It pays its employees stationed here;

¹ Plaintiffs contend that this Court lacks subject matter jurisdiction over their claims (all of which are based on Texas state law), and have moved to remand the action. That motion still is pending.

provides them with funds for private schools and housing; and provides them with insurance and pension benefits while they are here. Ruhrgas also owns a substantial stake (worth at least \$42 million) in Houston-based Tenneco Energy Resources Corporation ("TERC"), and actively participates in the management of that corporation. Several of Ruhrgas' key executives attend no fewer than twelve business meetings in Houston every year, not to mention attendance at seminars and the like in Texas.

Among other things, Ruhrgas' active participation in TERC provides Ruhrgas with invaluable information and experience regarding the U.S. gas market, which Ruhrgas considers important to its own business. Ruhrgas has even signed contracts with TERC in Houston that provide for the application of Texas law in the event of any dispute. Ruhrgas also purchases thousands of dollars worth of goods and services from various Texas-based companies, and has done so for over twenty years. Thus Ruhrgas has established substantial, continuous and systematic contacts with Texas, and has purposely availed itself of the benefits of doing business in Texas on many occasions. With employees actually living and working in Houston, executives here on average every month, and numerous contracts and purchase orders with Texas residents, Ruhrgas can hardly argue that it could not anticipate being haled into court in this State.

It is difficult to understand how Ruhrgas can claim with a straight face that it is not subject to personal jurisdiction in Texas in light of the multitude of business contacts it has with this State. Regardless of its motives, however, its motion to dismiss for lack of personal jurisdiction should be denied.

ARGUMENT

I. THE APPLICABLE LEGAL STANDARDS

This case presents somewhat of a jurisdictional anomaly. The Plaintiffs contend that this Court does *not* have subject matter jurisdiction over their claims, and that the action should be remanded to the State court in which it originally was filed. Ruhrgas has asserted, however, that it is not susceptible to personal jurisdiction in any Texas court. Thus, Plaintiffs are placed in the unusual position of demonstrating why Ruhrgas is subject to personal jurisdiction in Texas, even though they contend this Court ultimately lacks subject matter jurisdiction over the case.

A. Motions to Dismiss

Despite this case's unusual posture, the standards governing a motion to dismiss are well settled and familiar. Ultimately, the plaintiff bears the burden of establishing jurisdiction over the defendant. *Bullion v. Gillespie*, 895 F.2d 213, 216-17 (5th Cir. 1990); *WNS, Inc. v. Farrow*, 884 F.2d 200, 203 (5th Cir. 1989). However, the plaintiff need only make out a prima facie case in this regard; proof by a preponderance is not required. *Union Carbide Corp. v. UGI Corp.*, 731 F.2d 1186, 1189 (5th Cir. 1984); *Jetco Elec. Indus., Inc. v. Gardiner*, 473 F.2d 1228, 1232 (5th Cir. 1973). When considering a motion to dismiss, all allegations of the plaintiff's complaint must be taken as true unless they are specifically controverted by opposing affidavits. *D.J. Inv., Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 546 (5th Cir. 1985). Furthermore,

all factual conflicts must be resolved in the plaintiff's favor. *Id.*

B. Specific vs. General Personal Jurisdiction

Ruhrgas has been served under the Texas Long-Arm Statute. Tex. Civ. Prac. & Rem. Code §§ 17.041-17.045. Because that statute extends to the full constitutional limits, *Hall v. Helicoptero Nacionales de Columbia, S.A.*, 638 S.W.2d 870, 872 (Tex. 1982), *rev'd on other grounds*, 466 U.S. 408 (1984), this Court need only consider whether the exercise of jurisdiction over Ruhrgas satisfies the two-fold requirements recognized under the Due Process Clause: First, that Ruhrgas has "certain minimum contacts" with the forum (for present purposes, Texas); and, second, that the exercise of personal jurisdiction will "not offend the traditional notions of fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

The minimum contacts prong may be satisfied in one of two ways. First, the defendant may be called to answer where it has had "continuous and systematic" contacts with the forum, in which case "general jurisdiction" is said to exist. *Helicopteros*, 466 U.S. at 414-15. Alternatively, when the cause of action arises from or relates to the contact, even a single, deliberate contact with the forum will support "specific jurisdiction." *E.g., Micromedia v. Automated Broadcast Controls*, 799 F.2d 230, 234 (5th Cir. 1986) (describing specific jurisdiction); *Keller v. Millice*, 838 F. Supp. 1163, 1167 (S.D. Tex. 1993). As the Third Circuit recently explained: "Unlike establishing general jurisdiction, where the party must be shown to have

'maintained continuous and substantial forum affiliations,' establishing specific jurisdiction . . . requires only that a party be shown to have committed at least one act in the forum which is substantially related to the claim being adjudicated." *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1559 (3d Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 480 (1994).

C. Physical Presence is Not Required, But is Significant

Physical presence in the forum State is not required to establish specific jurisdiction. See *Burger King*, 471 U.S. at 476, 479-80; *Vault Corp. v. Quaid Software Ltd.*, 775 F.2d 638, 640 (5th Cir. 1985); *Brown v. Flowers Indus., Inc.*, 688 F.2d 328, 333 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983); *Product Promotions, Inc. v. Costeau*, 495 F.2d 483, 496 (5th Cir. 1974) ("contact by mail alone can be sufficient"). In *Burger King*, for example, the Supreme Court upheld jurisdiction over defendant Rudzewicz even though he had no physical contact with the forum. See also *Product Promotions*, 495 F.2d at 495-96 (finding jurisdiction in Texas despite fact that Defendant had never visited Texas and supposed locus of events was in Europe). Nevertheless, "territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there." *Burger King*, 471 U.S. at 476; *Burnham v. Superior Court*, 495 U.S. 604, 637-38 (1990) (Brennan, J., concurring) ("By visiting the forum State, a transient defendant 'avails' himself of significant benefits provided by the state.").

As is demonstrated below, Ruhrgas' own testimony and papers reveal that it has sufficient contacts with Texas to satisfy both the specific and general jurisdictional standards. Furthermore, an exercise of personal jurisdiction over Ruhrgas by a Texas court would be "fair" in light of the facts of this case.

The Court must consider as true the following allegations, all of which Ruhrgas has not controverted:²

1. That Ruhrgas participated in a conspiracy with Statoil and other Consortium members to monopolize the Western European natural gas market [Petition at ¶12];
2. That pursuant to this conspiracy, it sought to induce Plaintiffs to invest money to develop the Heimdal field and to underwrite the costs of a pipeline from that field to a Ruhrgas-controlled distributing system in Emden, Germany [Petition at ¶13, 18 19];
3. That it promised to pay a premium price for Heimdal gas if Plaintiffs would invest in the development of the Heimdal field and underwrite the costs of constructing a pipeline to Emden [Petition at ¶19];
4. That at the time it made that promise, Ruhrgas never intended to pay a premium price for Heimdal gas, but only made the promise to induce Plaintiffs to fund the

² Even assuming that Ruhrgas could, in good faith, deny the existence of some of these facts, the burden at this preliminary stage is simply to make out a *prima facie* case. Any contested questions of fact would have to be resolved in favor of exercising jurisdiction. *WNS, Inc. v. Farrow*, 884 F.2d 200, 203 (5th Cir. 1989).

development of the Heimdal field [Petition at ¶20-21, 38];

5. That it never disclosed to Plaintiffs (a) that it was attempting with Statoil and the Consortium to monopolize the gas market, (b) that connecting the Heimdal field [sic] to Emden was part of this attempted monopolization, (c) that it never intended to pay the promised premium price for gas, or (d) that it had agreed with Statoil not to transport gas from the Troll field through the Heimdal field (thereby preventing the tariff reduction Statoil had projected) [Petition at ¶21, 30-32]; and
6. That the Plaintiffs advanced hundreds of millions of dollars to develop the Heimdal field as a foreseeable result of Ruhrgas' omissions and representations [Petition at ¶21, 39].

Based on these facts, the Court must assume the existence of a conspiracy and that Ruhrgas fraudulently induced Plaintiffs to advance millions of dollars for the development of the Heimdal field. Ruhrgas primary defense, then, is that even if its conduct was wrongful, it occurred outside of the United States and Ruhrgas never could have anticipated being sued in Texas regarding such conduct. The facts, however, clearly demonstrate otherwise.

III. RUHRGAS' SPECIFIC JURISDICTIONAL CONTACTS WITH TEXAS

A. Ruhrgas' Tortious Conduct Occurred, at Least in Part, in Texas

Specific jurisdiction is present where there is a relationship between the defendant, the forum, and the litigation. *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772 (5th Cir. 1988). In this Circuit, it is well settled that where the defendant knowingly and purposefully enters the forum for the purpose of transacting business that relates to subsequent litigation there, the exercise of specific jurisdiction is proper. *E.g., Id.* at 772; *Keller*, 838 F. Supp. at 1167. In this case, specific jurisdiction unquestionably exists because Ruhrgas has had plentiful contacts (both in person and through correspondence) with Plaintiffs in Texas relating specifically to the subject matter of this lawsuit.

1. Ruhrgas Attended Meetings in Texas Regarding the Subject Matter of this Lawsuit

On three separate occasions, Ruhrgas representatives actually traveled to Houston to meet with representatives of the Plaintiffs concerning the Heimdal field. Wolf-Dietrich Hoffmann, Ruhrgas' head of purchasing for North Sea contracts, conceded as much during his deposition:

Q. Didn't you have a meeting in Houston?

A. We had a meeting in Houston with Marathon in February of '87.

Q. And the purpose of your meeting in Houston was to discuss the Heimdal project?

A. Yes.

Q. And you met with a number of Marathon personnel?

A. Yes.

Q. And in addition to their MPCN hats,³ you were aware that they also wore hats for other Marathon companies, such as MIOC and MOC?

A. Not necessarily. It was as it always was, Marathon had multifunctional hats.

Q. And the persons you met with in these meetings in Houston had multifunctional hats?

A. Yes.

Hoffmann Deposition at 177:25-178:21 (attached as Exhibit 1). Significantly, it was at this 1987 meeting that Ruhrgas announced for the first time that it would not pay the promised premium price for Heimdal gas, and declared that its Gas Sales Agreement with MPCN was invalid. Hoffmann Deposition at 181:3-183:13. Notes of this meeting, and the two other Houston meetings, are attached as Exhibit 2. Plaintiffs allege that Ruhrgas promised a premium price in 1981 to induce them to loan funds for the development of the Heimdal field, but

³ Hoffmann previously had testified that "the Marathon people always had many hats, several at one time sometimes," and that one of those hats was Marathon Oil Company, and one was Marathon International Oil Company. Hoffmann Deposition at 138:1-13.

never intended to pay that price. The 1987 Houston meeting occurred after the field already had been developed, after the pipeline to Ruhrgas' Emden facility had been completed, and after all of Plaintiffs' money had been spent. The announcement at this meeting was, therefore, the culmination of the first part of Ruhrgas' plan with its co-conspirators. This contact alone would be sufficient to establish specific personal jurisdiction over Ruhrgas, but additional contacts abound.

After discussing the 1987 Houston meeting, Dr. Hoffmann went on to discuss *another* meeting in Houston:

Q. And then after the arbitration, you had another meeting in Houston?

A. In November, 1989, yes.

Q. And was that meeting also related to Heimdal?

A. Yes.

Q. And you met again with Marathon personnel who wore multiple hats?

A. Yes.

Hoffmann Deposition at 178:25-179:13. He then continued discussing *yet another* Houston meeting:

Q. And you had a second meeting – I mean a third meeting in 1990, in Houston?

A. Yes.

Q. And the subject of that meeting was the Heimdal project and dealings between Marathon and Ruhrgas?

A. Again, with the note that it was not Ruhrgas, but Ruhrgas in connection with the other buyers.⁴

Q. And you met again with Marathon personnel who wore multiple hats?

A. Yes.

Q. But Ruhrgas personnel did attend, correct?

A. Yes, the three gentlemen I named.

Hoffmann Deposition at 179:14-180:6. These latter two meetings were part of the second half of Ruhrgas' and Statoil's plan: to string Plaintiffs along, and obtain additional development funds, with the promise that additional gas from the Troll field would be directed through Heimdal, thereby reducing Plaintiffs' costs even if they were not paid the premium price. Plaintiffs allege that at the time of these meetings, Ruhrgas and Statoil already planned to route the Troll gas around Heimdal; that Statoil nevertheless continued sending Plaintiffs projections showing that Troll gas would be routed through Heimdal, thereby reducing tariff rates; and that Ruhrgas never disclosed these facts to Plaintiffs. See Petition at ¶30-32, 52-53. Thus, these meetings directly relate to the allegations of this lawsuit as well.

It is undisputed that Ruhrgas never told Plaintiffs during any of these meetings of its monopolistic plans, of

⁴ Hoffmann's reference to the "other buyers" refers to the Consortium. See Hoffmann Deposition at 180:20-181:1.

its true relationship with Statoil, of its plans with Statoil to route Troll gas around Heimdal, or that it never had intended to pay a premium price for Heimdal gas even though it had promised to do so to induce Plaintiffs to develop the Heimdal field.

2. Ruhrgas Sent Mountains of Correspondence to Plaintiffs in Texas

In addition to these three Houston meetings, Ruhrgas produced hundreds of documents evidencing correspondence between Ruhrgas and the Plaintiffs relating to the Heimdal project. Exhibit 3 is a collection of a portion of this correspondence, all of which is between Ruhrgas and MOC or NIOC in Houston (as opposed to MPCN in Norway or Houston). See *Kultur Int'l Films, Ltd. v. Covent Garden Pioneer, FSP, Ltd.*, 860 F. Supp. 1055, 1061-62 (D.N.J. 1994) (explaining significance of such communications in the context of modern commercial transactions). Ruhrgas also telephoned Plaintiffs in Houston on numerous occasions.⁵ As with the meetings referred to above, it is undisputed that Ruhrgas never told Plaintiffs in any of this correspondence of its true plans and motivations relating to the Heimdal field. These activities, like the Houston trips, are directed [sic] related to

⁵ Hoffmann confirmed that he personally called Marathon personnel in Houston on average four times a year over a fifteen year period, and acknowledged that other Ruhrgas representatives made similar calls. Hoffmann Deposition at 141:21-142:10. Notes of a few of these calls are attached as Exhibit 4. Such phone calls plainly provide specific jurisdictional contacts. See *Burger King*, 471 U.S. at 481; *Brown*, 688 F.2d at 333; *Product Promotions*, 495 F.2d at 496.

the instant litigation, were purposefully directed at Texas, and can in no way be characterized as the "random," fortuitous" or "attenuated." *Burger King*, 471 U.S. at 479-81 (finding sufficient contacts with Florida where defendant knew decision-making authority was based there and effects of torts related to contract would be felt there). Thus, this is not a case where the defendant has merely introduced a product into the stream of commerce (*Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 114 (1987)) or where the only contact with the forum was the result of the plaintiffs having traveled there. *Worldwide Volkswagen v. Woodson*, 100 S. Ct. 559 (1980).

In specific jurisdiction cases, the Fifth Circuit has consistently upheld jurisdiction based on a single, deliberate contact with the forum related to the subject matter of the action. E.g., *Brown*, 688 F.2d at 333 (finding jurisdiction based on single telephone call to forum); see also *Burger King*, 471 U.S. at 476 n.8 (1985) (noting a single act may be sufficient). Here, Ruhrgas has far more than a single, deliberate contact within the forum boundaries. Given that part of this case is based on fraudulent omissions and misrepresentations that occurred during these Houston meetings, phone calls, and correspondence, this case presents the classic specific jurisdiction fact pattern.

3. Ruhrgas' "MPCN" Defense is Belied by the Evidence

Ruhrgas' only response to the overwhelming evidence of its direct Texas contacts relating to this suit is to argue that these contacts exclusively were between Ruhrgas and MPCN – not Plaintiffs. To this end, Ruhrgas

evidently claims it had no idea that MOC and MIOC were providing the funding for the Heimdal project. Indeed, Ruhrgas implies that it entered a Gas Sales Agreement with MPCN that it knew would require the expenditure of hundreds of millions of dollars without the slightest interest in how MPCN would obtain the funds necessary to comply with its obligations. See Hoffmann Deposition at 123-24.

Despite its current lapse of corporate recollection, it seems clear that Ruhrgas was well aware of MOC's and MIOC's interest in MPCN's Heimdal operations. For example, Ruhrgas admitted that it loans money to its own subsidiaries to fund projects.⁶ Hoffmann confirmed that Marathon representatives told him that if Marathon were forced to reduce its gas price to the level Statoil had agreed, it would lose \$500 million.⁷ Hoffmann later admitted that if a Ruhrgas affiliate suffered a \$500 million loss, the upper management of Ruhrgas certainly would be concerned.⁸

Additionally, Exhibit 7 contains numerous instances of Ruhrgas addressing correspondence to MPCN, then copying one of the Plaintiffs in Houston to advise it of the same information. Unless Ruhrgas knew Plaintiffs were funding the project, there would have been no reason to send them copies of such correspondence. Indeed, the documents included in Exhibit 8, which were produced

⁶ See excerpt of Ruhrgas' 1988 annual report (attached as Exhibit 5), and Bentzien Deposition at 75:24-76:15) (attached as Exhibit 6).

⁷ Hoffmann Deposition at 188:9-13.

⁸ *Id.* at 195:9-11.

from Ruhrgas' own records, show that Ruhrgas conducted comprehensive research into the corporate structures of MOC and United States Steel Corporation (MOC's parent). As previously mentioned, Hoffmann admitted that when meeting with MOC representatives negotiating for MPCN, he knew those representatives wore "multifunctional hats," including MOC and MIOC "hats." He also confirmed that he knew one method for MPCN to fund its Heimdal operations would be to borrow the money from its parent company.⁹

Finally, when asked about the hundreds of millions of dollars required to develop the Heimdal field, Hoffmann stated that "for Marathon that need not have been a great amount of money." Hoffmann Deposition at 107:24-108:2. When asked why not, he replied "because Marathon is in the oil and gas production and exploration business and in that business, it's not such a great amount of money." MPCN, of course, is *not* in the oil and gas production business except for its Heimdal operations, none of which had started at the time the Heimdal field was developed. Thus, Hoffmann at least implicitly acknowledged that he knew Plaintiffs (*i.e.* "Marathon"), not MPCN, were the ultimate source of funding for the Heimdal field's development. Likewise, Gerhard Enselsing, Ruhrgas' head of gas purchasing, conceded that he knew from the start that the Heimdal project would have to be approved by the Marathon parents, the Plaintiffs here. Enselsing Deposition at 39-41 (attached as Exhibit 9). In any event, evidence such as that outlined above confirms the foreseeability of Plaintiffs' funding, and at the

⁹ *Id.* at 117:25-118:10.

very least raises a sufficient factual question to defeat a motion to dismiss.

4. Ruhrgas' Authorities are Inapposite

As Ruhrgas acknowledges, the personal jurisdiction determination must be based on the peculiar facts of each case. Ruhrgas Mem. at 6. But Ruhrgas then goes on to selectively highlight *some* of its contacts with Texas and draws supposed parallels with other cases. *Id.* at 9-14. To the extent these cases demonstrate anything helpful to the inquiry in this case, however, they confirm the legal principle that should be obvious: that multiple contacts related to a pending action satisfy the due process requirement.¹⁰

WNS, Inc. v. Farrow, 884 F.2d 200 (5th Cir. 1989), which Ruhrgas does not cite or discuss, is particularly

¹⁰ Ruhrgas discusses three Fifth Circuit cases where the defendants' contacts were found to be lacking. For example, Ruhrgas relies on the holding in *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061 (5th Cir.), *cert. denied*, 506 U.S. 867 (1992), and correctly points out that defendant Total Exploration could not be called to answer a third-party complaint. Unlike Ruhrgas, however, Total Exploration had never once visited Texas. Ruhrgas Mem. at 9. Likewise, the defendant in *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 773 (5th Cir. 1988), unlike Ruhrgas, had no connection to the forum relating to the action apart from the fact that the plaintiff happened to reside there. Ruhrgas' third citation, *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026 (5th Cir. 1984) was a contract action in which the parties had bound themselves to another state's law. Of course, as Ruhrgas admits, this fact materially affects the jurisdictional analysis. *E.g.*, *Holt Oil & Gas Corp.*, 801 F.2d at 778.

instructive. There, the Fifth Circuit found sufficient contacts to require the defendants, the Farrows, to answer in Texas, despite contacts far less substantial than those involved here. In that case, WNS, a Texas corporation located in Houston, licensed the "Deck the Walls" trade name to Mrs. Farrow under a franchise arrangement. Mr. Farrow then opened a "Deck the Walls" store in Georgia. The Farrows' physical contact with Texas consisted of a single joint visit to Houston for the purpose of meeting with WNS employees to negotiate and structure a franchise agreement and a subsequent training session attended only by Mrs. Farrow. *Id.* at 201. When WNS learned that Mr. Farrow had been operating a competing business in Georgia, it brought suit against both Mr. and Mrs. Farrow in Texas state court.

Following removal, the district court dismissed WNS' claim for lack of personal jurisdiction. The Fifth Circuit reversed. It stressed that the dispute with respect to whether the Farrows intended to breach their agreement at the time of their sole joint visit to Texas had to be resolved in WNS' favor. *Id.* at 202-03. To the court, WNS' uncontroverted allegation that the Farrows had failed to reveal their true intentions during the course of the Houston meetings was controlling. *Id.* at 204; accord *Pizabioche v. Vinelli*, 772 F. Supp. 1245, 1250 (M.D. Fla. 1991); *Rockshots, Inc. v. Constock Cards, Inc.*, No. 89-CIV.-3453-CSH, 1990 WL 74514 at *2 (S.D.N.Y. May 20, 1990).

B. Ruhrgas Deliberately Caused Injury In Texas

Undeniably, Ruhrgas was aware that Marathon and MIOC were both Texas residents during most of the relevant time period.¹¹ See, e.g., Exhibit 10 (where Marathon advised Ruhrgas that it had moved its corporate offices to Houston); Exhibits 3 and 7, (showing substantial correspondence with Plaintiffs in Houston). Ruhrgas concedes that it was aware that its actions allegedly would cause "Marathon" to lose \$500 million, but did not consider that fact important. Hoffmann Deposition at 188:9-13, 189:5-8.

As noted above, Ruhrgas has made no effort to deny the existence of a conspiracy between itself, the Consortium and Statoil concerning North Sea gas, or its own fraudulent conduct.¹² Nor has Ruhrgas denied the significant damages suffered by the Plaintiffs. See Petition at ¶21, 33-35. Likewise, Ruhrgas has not denied that between the reduced gas price and the lack of tariff relief, MPCN never will be able to repay MOC or MIOC. At this point, taking as true the existence of the conspiracy and

¹¹ During the earliest stages of the Heimdal field's development, both companies were based in Ohio. At all times, both companies were incorporated in Delaware. The question of contacts with these states has not been addressed by Ruhrgas, although it may be relevant if this court's jurisdiction is premised on the existence of a federal question. See Fed. R. Civ. P. 4(k)(2).

¹² To the contrary, Hoffmann confirmed that the conspiracy still is ongoing, acknowledging that one of the first things Ruhrgas did upon receipt of this suit was to meet with the Consortium members and call Statoil regarding the suit. See Hoffmann Deposition at 27-31.

fraud together with at least a foreseeable massive resulting injury ultimately falling on Texas residents, there is no question but that Ruhrgas should have foreseen the possibility of being haled into a Texas court in an action, like this one, arising out of the fraud and conspiracy. Cf. *Burger King*, 471 U.S. at 481; accord *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772 (5th Cir. 1988); *Vault Corp.*, 775 F.2d at 640; *Hawkins v. Upjohn Co.*, 890 F.Supp. 601, 608 (E.D. Tex. 1994).

In sum, Ruhrgas' contacts with Texas related to this litigation are substantial. Ruhrgas repeatedly traveled to Houston to conduct meetings with the Plaintiffs concerning the gas field and tariffs at issue here; Ruhrgas repeatedly corresponded with the Plaintiffs in Houston by telex and telephone; and Ruhrgas knew (or at the very least, should have known) that massive injury would ultimately fall on the Plaintiffs in Houston. If these contacts are not sufficient to establish specific jurisdiction, one can scarcely imagine what connection could be.

III. RUHRGAS' GENERAL JURISDICTIONAL CONTACTS WITH TEXAS

In addition to contacts specifically related to this litigation, Ruhrgas also has substantial, continuous and systematic contacts with Texas sufficient to create general jurisdiction. For instance, Ruhrgas maintains a permanent and intimate relationship with Houston-based Tenneco Energy Resources Corporation ("TERC"). Although mere affiliation with an in-state corporation, without more will not constitute "purposeful availment" so as to warrant

the exercise of general jurisdiction, Courts have long regarded corporate affiliations as playing a substantial role in the jurisdictional inquiry. E.g., *Energy Reserves Group, Inc. v. Superior Oil Co.*, 460 F. Supp. 483, 490 (D. Kan. 1978). In addition, Ruhrgas' relationship with TERC reveals contacts with Texas that go well beyond a "mere affiliation." Furthermore, these contacts are far from the only ones Ruhrgas routinely has with Texas. See *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 779 (5th Cir. 1986), cert. denied, 481 U.S. 1015 (1987) (general jurisdiction inquiry relates to totality of defendant's contacts with forum).

A. Ruhrgas' Active Participation In the U.S. Gas Market Through TERC

In February, 1994, Ruhrgas acquired twenty percent of the stock of Houston-based TERC for \$47 million. See Exhibit 11 (Ruhrgas' stock purchase agreement). The transaction was negotiated for more than a year in Houston, Texas, the resulting Stock Purchase Agreement was signed in Houston, and the contract provided that Texas law would apply to any disputes. *Id.*; Benke Deposition at 42-43, 25 (attached as Exhibit 12). TERC (which is headquartered in Houston) operates approximately 2,000 miles of intrastate gas pipelines, mostly in Texas; has annual sales of approximately \$2 billion; and controls approximately 5% of the U.S. natural gas market. Benke Deposition at 63:7-18. TERC also has several wholly owned subsidiaries that are headquartered in Texas as well. See Exhibit 13 (detailing TERC's corporate structure).

Through this ownership interest, Ruhrgas intends to "participate in the growth of the gas marketing business in the USA" and to "make money in [the U.S. gas marketing] business." See excerpts from Ruhrgas' 1993 Annual Report (attached as Exhibit 14), and Benke Deposition at 30. In connection with its purchase of TERC shares, Ruhrgas also signed a Noncompetition Agreement in Houston which prohibits Ruhrgas from conducting gas marketing activities in the U.S., Mexico or Canada "other than through TERC and its Subsidiaries." See Exhibit 15 at 2. That agreement also is governed by Texas law, and even contemplates the possibility of litigation in Texas. *Id.* at 4; Benke Deposition at 50.

Ruhrgas is hardly a passive investor in TERC. The head of Ruhrgas' Joint Ventures West division, Eike Benke, sits on TERC's board of directors, which is charged with managing TERC's business and affairs. See Exhibit 16 at 5; Benke Deposition at 7:16-19. In his affidavit attached to Ruhrgas' motion, Benke acknowledged that he "periodically travels to Houston to attend meetings." Affidavit of Eike Benke at ¶ 3 (attached to Ruhrgas' motion). Indeed - in his deposition, Benke revealed that he and two other Ruhrgas officials, including Ruhrgas' head of corporate acquisitions, travel to Houston three times a year to attend TERC board meetings on behalf of Ruhrgas. Benke Deposition at 10-11, 16. Benke and his staff *also* travel to Houston three times a year to attend TERC "Risk Committee meetings." *Id.* at 14, 71-72. Benke *also* travels to Houston to attend TERC Budget and Finance Committee meetings three times a year, although he is not a member of that committee. *Id.* at 15. Jurgen

Schneider, another Ruhrgas executive, is on TERC's Budget and Finance Committee, however, and he also attends those meetings in Houston three times each year. In addition, Benke and other Ruhrgas officials regularly travel to Houston to attend "group leader" meetings at TERC, again, approximately three times a year. *Id.* at 65-67, 69-70. All told, Benke, Schneider, and some other Ruhrgas representatives, regularly travel to Houston to attend at least 12 different business meetings every year. Copies of some of the minutes of TERC meetings Ruhrgas representatives have attended are attached as Exhibit 17.

Through TERC and Ruhrgas' other Texas connections (including meetings with leading U.S. oil and gas companies, some of which indirectly hold significant ownership interests in Ruhrgas), Ruhrgas continually conducts hands-on monitoring of the U.S. gas market.¹³ This constant monitoring is an integral part of Ruhrgas' business. Benke Deposition at 75-76, 53, 64. Thus, the substantial activities detailed above are not merely undertaken to secure Ruhrgas' \$47 million investment, but are a part of its overall business.

B. Other Ruhrgas Business Trips to Texas

Ruhrgas officers also travel to Texas for the purpose of engaging in world-wide joint ventures with Tenneco,

¹³ See Benke Deposition at 39-40 (U.S. oil companies hold interests in Ruhrgas), 74-75 (those companies can only give Ruhrgas a momentary picture of the U.S. gas market, but Ruhrgas can continually monitor the market through TERC).

to attend business seminars, and to attend business meetings. See Affidavit of Lutz Eckert at ¶17 (attached to Ruhrgas' motion.); Exhibits 18 (sample of seminar) and 19 (meeting in Houston at request of Government of Russia and the World Bank attended by senior Ruhrgas officials); Bentzien Deposition at 46. Klaus Liesen, "Chairman of the Executive Board of Ruhrgas" is a member of Tenneco's European Advisory Council, which advises that company and meets twice annually in either Europe or Houston. See Affidavit of Dirk Plambeck at ¶3 (attached to Ruhrgas Motion).

In addition to the myriad trips and meetings described above, Benke and other Ruhrgas representatives regularly travel to Texas or the United States to conduct business on Ruhrgas' behalf. For example, Ruhrgas officials have attended various meetings concerning the U.S. domestic natural gas business with Mobil, ARCO and other leading U.S. oil and gas companies in Texas. Benke Deposition at 74, 76, 79; Exhibit 20. Also, in addition to the specific meetings reflected in the documents, Benke testified there were additional Ruhrgas visits to other companies involved in the U.S. gas market, noting that these meetings may have taken place in Houston because "an awful lot of companies that get involved in the energy business have their headquarters in Houston." Benke Deposition at 78. All of these visits reflect a "purposeful interjection in Texas and the United States. *Akanse v. Fatjo*, No. H-91-3140, 1993 U.S. Dist., Lexis 19370 at *5 (S.D. Tex. May 21, 1993).

C. Ruhrgas Maintains Employees That Live and Work in Houston on Its Behalf

Perhaps even more significant to the general jurisdiction analysis than all of the regular Texas business meeting described above, Ruhrgas has employees that live and work in Houston on essentially a permanent basis. Since 1994, Ruhrgas has had employees in Houston every single day. Falkenhausen Deposition at 25-26 (attached as Exhibit 21). These employees are part of program through which Ruhrgas regularly assigns certain employees to work at TERC in Houston on a short term (one year) or long term (multi-year) basis. See Exhibit 22. At least two Ruhrgas employees are living in Houston right now – one has been here half a year; the other, since mid-1994. Falkenhausen Deposition at 14-15. Although this program was not formally documented until 1994, Ruhrgas has been sharing employees with Tenneco since 1992. *Id.* at 27-28; Exhibit 23. In all, since 1994, approximately 10 or 11 Ruhrgas employees have been stationed in Houston for periods ranging from several months to three years. Falkenhausen Deposition at 21-22.

When Ruhrgas employees are in Houston for a year or less, Ruhrgas pays their salaries directly. *Id.* at 19. Employees stationed in Houston longer than a year have their salaries paid by TERC. *Id.* at 18-19. Regardless of the length of stay, however, Ruhrgas continues to pay all its Houston-based employees overseas bonuses and salary differentials. *Id.* at 19. Ruhrgas maintains all of these employees in its pension schemes, and even subsidizes their housing – some employees have had apartments, and at least one rents a house in Houston. *Id.* at 26, 20, 15;

Exhibit 24. Ruhrgas also subsidizes the costs associated with sending its employees' children to private schools in Houston, and pays for a flight back to Germany every six months. *Id.* at 21. Most importantly, all employees remain "a full time employee of Ruhrgas" while temporarily assigned to TERC. See Exhibit 25.

These contacts are substantial, continuous and systematic by any definition. They are not, as Ruhrgas implies, merely extended "training" sessions. Quite to the contrary, Ruhrgas considers their constant presence in Houston to be beneficial to, and part of, Ruhrgas' business. Benke Deposition at 75:17-76:10. The fact that Ruhrgas maintains employees in Houston on a full time basis is itself sufficient to create general personal jurisdiction. Any of these employees could be involved in an accident, breach a rental agreement, commit a civil or criminal offense, or become involved in any number of activities that might foreseeably land them in a Texas court. For Ruhrgas to claim that it could not have anticipated being haled into a Texas court when it stations multiple employees in Houston borders on being frivolous.

D. Other Ruhrgas Contacts with Texas

In addition to the visits to MOC's offices relating to Heimdal, in addition to the visits to other Texas-based oil and gas companies to obtain information about the U.S. gas market, in addition to its substantial investment in (and regular management of) TERC, and in addition to the employees it has maintained in Houston for years,

Ruhrgas *also* purchases products and services from companies throughout Texas. These purchases are not isolated or insubstantial. To the contrary, Ruhrgas' summary of purchase orders from Texas companies alone reveals purchases totaling approximately \$1 million between April 1983 and October 1995. See Exhibit 26. This summary of purchases includes, among others, purchases from Dresser-Rand in Houston; Global Thermoelectric in Humble; Interface Design in Houston; Southwest Research in both Dallas and San Antonio; Machinery & Piping in San Antonio; Boffin, Inc. in Frisco; ESP, Inc. in Plano; C.B. Lowe in Houston; and Gas Equipment Testing Co. of Roanoke, Texas. The summary *excludes* millions of dollars that the Ruhrgas paid to DeGaulyer & McNayhton of Dallas (apparently on behalf of the Consortium) to perform reservoir evaluation services relating to Heimdal and other North Sea fields. See Fels-Huber Declaration (attached as Exhibit 27); Hoffmann Deposition at 100-101. Ruhrgas' share of this expense was over \$700,000. *Id.* Copies of some purchase orders Ruhrgas has sent to Texas companies are attached as Exhibit 28, further confirming the extent to which it purchases goods and services in this State. Ruhrgas also has employed a Texas headhunter to search for potential employees in Texas and elsewhere. See Falkenhausen Deposition at 32-33.

IV. RUHRGAS' GENERAL JURISDICTIONAL CONTACTS WITH THE UNITED STATES

Ruhrgas has alleged that this Court has subject matter jurisdiction over this action based in part on federal

question jurisdiction.¹⁴ Naturally, Plaintiffs disagree with this contention, but the allegation materially affects the personal jurisdiction inquiry. Amended Federal Rule 4 provides that, "with respect to claims arising under federal law," a defendant who is not subject to service in any state may be haled into court based on contacts with the United States as a whole. Fed. R. Civ. P. 4(k)(2) advisory committee note (1993 amendment); *see also* Kent Sinclair, 14 *Rev. Litig.* 159, 188 (1994) ("Rule 4(k)(2) allows courts to obtain personal jurisdiction in federal question cases over defendants based on 'nationwide contacts'").¹⁵ Ruhrgas does not admit to being subject to service in any State. Thus, to the extent this case is based on a federal question, the constitutional question would focus on Ruhrgas' contacts with the entire United States, not just Texas. Therefore, to the extent these rules even apply to

¹⁴ Ruhrgas' removal is based on three alternative grounds. First, Ruhrgas urges that the Plaintiffs' state law claims are converted into federal questions and that the state court is stripped of authority, apparently under the auspices of 28 U.S.C. § 1331, because "international issues" are involved. Second, Ruhrgas claims that an arbitration agreement between itself and a Norwegian affiliate of the Plaintiffs (not a party here) creates federal question jurisdiction under 9 U.S.C. § 201, *et seq.* Lastly, Ruhrgas claims that Plaintiff Marathon Norge, the holder of title to all of Marathon's unproduced gas, has no possible interest in this case and was therefore fraudulently joined. As a result, claims Ruhrgas, this case also may be treated as a diversity action.

¹⁵ For additional confirmation see *Eskofot A/S v. E.I. du Pont de Nemours & Co.*, 872 F. Supp. 81, 86-87 (S.D.N.Y. 1995); David D. Siegel, *The New Rule 4 of the Federal Rules of Civil Procedure: Changes in Summons Service and Personal Jurisdiction*, 152 FRD. 249, 252-56 (1994).

this case, Plaintiffs will briefly outline Ruhrgas' substantial contacts with the U.S.

Ruhrgas does a sizable business in the United States. As its own charts detailing its holdings in the U.S. attest, Ruhrgas owns a number of substantial companies. *See* Exhibits 29 and 30. For example, Ruhrgas is the sole owner of a number of holding companies which in turn wholly own American Meter Company, a Delaware corporation operating out of Pennsylvania. Bentzien Deposition at 18-20. American Meter is the largest manufacturer of gas meters in the world. Exhibit 31. It employed more than 1,100 people in 1988, and that number appears to be increasing. *See* Exhibit 32 (excerpt from 1988 Annual Report of Ruhrgas at 33, 56-59) and Exhibit 33 (excerpt from 1993 Annual Report of Ruhrgas at 39). It maintains offices within the United States and makes sales throughout the entire United States, including Texas. Bentzien Deposition at 20, 58. Ruhrgas reportedly purchased the company for \$132 million and relocated certain of its operations to Nebraska. Exhibit 31. Ruhrgas officials sit on the board of American Meter and travel to the United States two or three times a year to attend board meetings. Bentzien Deposition at 20. Ruhrgas officials also travel to the United States to attend meetings of American Meter's wholly-owned subsidiaries. *Id.* at 68.

Similarly, Ruhrgas officials also travel to the United States to attend meetings of American Meter Holdings Company (previously known as "Ruhrgas Carbon"), American Meter's parent. *Id.* at 21, 27. That company is run by a President who is a Ruhrgas employee living in Germany. *Id.* at 64-65. Its board meetings take place in the

United States. *Id.* at 66; see Exhibit 34 (board meeting minutes showing Ruhrgas participation).

Ruhrgas also owns Kromschoder, Inc., an American corporation specializing in gauging and instrumentation equipment (Bentzien Deposition at 21-23); LOI, Inc., a Pennsylvania corporation that manufactures gas burners for use in the aerospace industry (*Id.* at 24); and Hauck Manufacturing, which also manufactures gas burners, although for a different application (*Id.* at 25). Both LOI and Hauck make sales throughout the United States and hold their meetings, which Ruhrgas officials attend, in the United States. *Id.* at 69-72.

Ruhrgas also owns Abar Ipsen and Centaur Vacuum. Ruhrgas officials sit on the boards of these companies and travel to the United States several times a year to attend board meetings. *Id.* at 25-26; 63. Mr. Bentzien estimated the sales of Abar Ipsen to be about \$40 million; the sales of Centaur Vacuum to be about \$10 million; the sales of Hauck to be about \$20 million; and the sales of LOI to be about \$4 to \$5 million. *Id.* at 29.

Ruhrgas purchases millions of dollars worth of goods and services from U.S. companies. A Ruhrgas-prepared summary of its U.S. purchases is attached as Exhibit 26. In addition to these purchases, Ruhrgas also purchases accounting services from Arthur Andersen, apparently on behalf of American Meter Co., in Philadelphia. See Exhibit 35. That firm, and Price Waterhouse, also did work for Ruhrgas in Texas in connection with Ruhrgas' acquisition of its interest in TERC. Bentzien Deposition at 71; Exhibit 36. At one point, Ruhrgas also maintained bank accounts in the United States as well. Bentzien Deposition at 74.

These facts, considered in connection with Ruhrgas' numerous other Texas contacts described earlier, reveal a continuous relationship with the United States. Accordingly, having availed itself repeatedly of the privilege of conducting activities here, Ruhrgas cannot reasonably assert that it has been unfairly surprised by the prospect of defending a lawsuit here. See *Holt Oil & Gas Corp.*, 801 F.2d at 777.

V. THE EXERCISE OF JURISDICTION OVER RUHRGAS IS CONSISTENT WITH DUE PROCESS

The second prong of the due process analysis requires that the exercise of jurisdiction not offend the traditional notions of fair play and substantial justice. *Burger King*, 471 U.S. at 476; *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945). Where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. *Burger King*, 471 U.S. at 477. Such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional, such as application of choice of law rules. *Id.* When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even serious burdens placed on the alien defendant. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987).

In assessing whether the exercise of personal jurisdiction offends the traditional notions of fair play and substantial justice, the court should consider (1) the interest of the forum state, (2) the plaintiffs interest in obtaining relief, (3) the burden on the defendant, (4) the shared interest of the several states in furthering fundamental substantive social policies, and (5) the interstate judicial system's interest in obtaining the most efficient resolutions of controversies. *Burger King*, 471 U.S. at 477; *Asahi*, 480 U.S. at 113; *Command-Aire Corp. v. Ontario Mechanical Sales & Serv. Inc.*, 963 F.2d 90, 95 (5th Cir. 1992). Many of these factors are discussed in considerable detail in Plaintiffs Response to Ruhrgas Motion to Dismiss on Forum Non Conveniens Grounds, which was filed on February 8, 1996, and Plaintiffs incorporate that discussion here.

In this case, Texas has a strong interest in providing an effective means of redress to Plaintiffs for Ruhrgas' participation in a fraud and conspiracy whose object and practical effect was to drain MOC and NHOC of hundreds of millions of dollars and to deprive Norge of the value of its interest in the Heimdal field. MOC and MIOC are both based in Houston, Texas. This case concerns well founded allegations that Ruhrgas lured Marathon and other affiliated corporations into advancing hundreds of millions of dollars of capital into a development project in the North Sea. To a significant extent, these loans remain unpaid and their proceeds have unjustly enriched Ruhrgas and others with whom it has conspired. Were it not for Ruhrgas' misrepresentations and fraudulent omissions, these funds still would be available to MOC and MIOC. Plainly, the State of Texas has a legitimate interest in providing recourse to its domestic energy industries

above and beyond its usual interest in redressing wrongs committed on its citizens within its borders. *See, e.g., Burger King*, 471 U.S. at 473 ("A state generally has a 'manifest' interest in providing its residents with a convenient forum for redressing injuries caused by out-of-state actors."); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (recognizing Texas' peculiar interest in regulating domestic energy production).

Moreover, Plaintiffs have an obvious interest in pursuing relief in their home state. This is not a case in which the plaintiff has chosen some remote forum to harass a defendant with no connection to it. Marathon and NHOC are based not only in this State, but in this district. The vast majority of their witnesses and documents are here. Accordingly, they have a substantial, legitimate interest in proceeding here. *E.g., Sea-Lift, Inc. v. Refinadora Costarricense de Petroleo, S.A.*, 792 F.2d 989, 993 (11th Cir. 1986).

Further, Ruhrgas is no more inconvenienced by defending here than is any other defendant. To be sure, Ruhrgas probably does not want to add defending this case to the list of activities it already conducts in Houston. Nonetheless, its preference to defend itself in Germany or "Europe" is not controlling. In view of its deliberate decisions to procure the benefits of funding from a Texas corporation and to travel here to obtain continued funding, it is hardly "unfair" to require a return visit related to that issue. The same is true of the extensive nature of Ruhrgas' holdings in the United States. Certainly, Ruhrgas has not shown that litigation in Texas would be so "gravely inconvenient" that it would be at such a "severe disadvantage" as would warrant a dismissal on grounds of unfairness. *Burger King*, 471 U.S.

at 478. If anything, the sheer number of Ruhrgas' filings to date and its willingness to contest every conceivable issue demonstrate otherwise.

CONCLUSION

Given the nature and extent of Ruhrgas' contacts with Texas, including personal visits to the State relating to the Heimdal field and the permanent stationing of its own employees in Houston, it is absurd, albeit predictable, that Ruhrgas denies personal jurisdiction. It is difficult to conjure a more convincing specific jurisdiction case, and the only way Ruhrgas could have more general contacts would be for it to open a Houston office in addition to TERC. Clearly, Ruhrgas has sufficient contacts with this State to permit a Texas court to exercise personal jurisdiction over it. That jurisdiction is consistent with the Due Process Clause. Accordingly, Defendant's Motion to Dismiss for Lack of Personal Jurisdiction should be denied in all respects.

JAN 21 1999

In The
Supreme Court of the United States
October Term, 1998

RUHRGAS AG,

v.

Petitioner,

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
and MARATHON PETROLEUM NORGE A/S,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

JOINT APPENDIX
VOLUME II, PAGES 255 TO 524

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY,	§	
MARATHON INTERNATIONAL	§	
OIL COMPANY, and	§	
MARATHON PETROLEUM	§	CIVIL ACTION
NORGE A/S,	§	NO. H-95-4176
Plaintiffs,	§	
VS.	§	
RUHRGAS, A.G.	§	
Defendant.	§	

RUHRGAS AG'S RESPONSE TO
MOTION TO REMAND

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

MARATHON OIL COMPANY,	§	
MARATHON INTERNATIONAL	§	
OIL COMPANY, and	§	
MARATHON PETROLEUM	§	
NORGE A/S,	§	CIVIL ACTION
Plaintiffs,	§	NO. H-95-4176
	§	
VS.	§	
RUHRGAS, A.G.	§	
Defendant.	§	

RUHRGAS AG'S RESPONSE TO PLAINTIFFS' MOTION TO REMAND

TO THE HONORABLE JUDGE OF THE UNITED STATES
DISTRICT COURT:

Defendant Ruhrgas AG, subject to and without
waiver of its previously filed motions, including but not
limited to its Motion to Dismiss for lack of personal
jurisdiction, files its Response to Plaintiffs' Motion to
Remand.

I.

INTRODUCTION

A. Overview

The Plaintiffs' procedural objective has been to sue
Ruhrgas AG in the state courts of Texas over disputes
arising from a gas sales agreement between Marathon
Petroleum Company (Norway) ("MPCN"), an affiliate of

the Plaintiffs, as seller, and a group of European gas purchasers, including Ruhrgas AG and several state-owned companies, regarding gas deliveries from the Norwegian Heimdal Field to Continental Europe.

This approach faced severe obstacles. The gas sales agreement contains an arbitration clause. Under legislation implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, this court would have removal jurisdiction if MPCN filed a state court action against Ruhrgas AG, and upon removal, would be required to stay the action pending arbitration. Moreover, there is diversity of citizenship between MPCN and Ruhrgas AG. Finally, the state-owned buyers under the gas sales agreement would have the ability to remove the case to federal court under the Foreign Sovereign Immunities Act, as would Statoil, Norway's state-owned oil company, that is also claimed to be responsible for Plaintiffs' alleged damages.

Counsel for Plaintiffs have ingeniously sought to overcome these difficulties, but have done so in manifestly improper ways. First, they have omitted the only real party in interest, MPCN, the seller under the gas sales agreement. Second, they have joined as a plaintiff a Norwegian affiliate, Marathon Petroleum Norge A/S ("Norge"), that assigned away all of its rights in the gas field to MPCN in the 1970's and has not exercised those rights since. Norge is a Norwegian corporation. As an "alien," its presence as a plaintiff would defeat diversity jurisdiction if properly joined. Third, they have joined as plaintiffs affiliates of MPCN who assert demonstrably insupportable claims based upon their alleged status as "lenders" to MPCN. Finally, Plaintiffs have sued none of

the state-owned buyers or Statoil. They have sued only Ruhrgas AG, even though it only comprises approximately 25% of the buyers' shares under the gas sales agreement.

In summary, the configuration of parties and claims is a virtual masquerade, in which no claims are asserted on behalf of the only real party in interest and in which claims are contrived on behalf of parties with no interest.

This Court has subject matter jurisdiction of this action on several grounds. First, Plaintiffs are bound by the arbitration clause in the gas sales agreement. Subject matter and removal jurisdiction exist under 9 U.S.C. §§ 203 and 205 because the claims which are the subject of this case are subject to mandatory arbitration pursuant to the Convention. Second, Norge is not a real party in interest, and it has no possibility of recovery, rendering its joinder fraudulent. Diversity therefore exists. Finally, Plaintiffs' claims raise substantial questions of foreign and international relations, which are incorporated into and form a part of the federal common law, creating federal question jurisdiction.

B. Factual Summary

The claims asserted in this lawsuit arise out of and relate to natural gas produced from the Heimdal Field in the Norwegian North Sea. MPCN sold and continues to sell the gas to Ruhrgas AG and other European buyers. Sales of the gas are governed by the Heimdal Gas Sales Agreement dated March 2, 1984 between MPCN, as seller, and Ruhrgas AG and the other European buyers, and an

amendment thereto dated May 11, 1990 (collectively, the "Agreement") attached to the Notice of Removal as Exhibit "B", Tab 1. The Agreement contains a Norwegian choice of law clause and a clause providing for arbitration of all disputes in Stockholm, Sweden.

During the course of the contractual relationship between MPCN and the buyers under the Agreement, a number of issues relating to the Agreement and in particular to the price of gas arose and were the subject of disputes and negotiations which were conducted primarily in Europe. One such dispute led to an arbitration filed by MPCN with the International Court of Arbitration of the International Chamber of Commerce in 1987. That arbitration resulted in an award in September of 1989. The arbitration award was challenged in court in Stockholm, Sweden by the buyers. While those proceedings were pending, negotiations ensued to resolve the disputes. The result of those negotiations was the amendment to the Heimdal Gas Sales Agreement which was executed in Germany on May 11, 1990, and the withdrawal of the proceedings challenging the arbitration award. Subsequently, further disputes relating to the Agreement developed between MPCN and the buyers. These disputes were the subject of further negotiation between MPCN and the buyers until the filing of this litigation.

C. The Parties Involved In (Or Notably Absent From) This Litigation

MPCN is the seller under the Agreement. The claims asserted herein are claims grounded on the alleged inadequacy of the price paid by Ruhrgas AG and the other buyers to MPCN and the resulting adverse economic consequences allegedly suffered by MPCN, allegedly rendering MPCN unable to satisfy its purported obligations vis-à-vis the Plaintiffs. While Norge has purported to assert claims as joint venturer and holder of the license in the Heimdal Field, Norge assigned those rights away to MPCN in the 1970s and has not exercised those rights since. While Plaintiffs Marathon Oil Company ("MOC") (MPCN's great-grandparent corporation) and Marathon International Oil Company ("MIOC") (MPCN's grandparent corporation) purport to assert claims in their capacity as alleged "lender" to MPCN, Plaintiffs' own representatives have acknowledged in deposition testimony that when Marathon personnel dealt with Ruhrgas AG, they did so only *on behalf of MPCN*, not the "lender," without any discussion with Ruhrgas AG of inter-company financial arrangements.¹ Evans Depo. (Ex. 1) at 23-25, 30; Bossley Depo. (Ex. 2) at 40-46, 53-54, 59-60, 62-64, 77-78. If any misrepresentations had been made to Marathon personnel (which Ruhrgas AG denies), MPCN would be the Marathon entity entitled to assert a claim. Yet MPCN is not a party to this case. At the scheduling conference on

¹ In any event, it is undisputed that since 1989, the rights of the "lender" have been held by Marathon Petroleum Investment, Ltd, not MOC or MIOC. Evans Depo. (Ex. 1) at 30-36.

November 6, 1995, Magistrate Judge Stacy asked counsel for Plaintiffs why MPCN is not a party. Tr. of Sched. Conf. (Ex. 4) at 8. Plaintiffs' counsel replied:

It's not pursuing the claims. That entity is almost out of existence now because of a lot of bad things that have been going on in Europe. If that entity wanted to bring claims on its own, I guess it could go do so in arbitration, but the point is, this case doesn't involve that. This case doesn't involve any breach of contract that Ruhrgas may have had with that entity. It doesn't - it's not asking for any sort of contract damages.

Id. (emphasis added). Contrary to counsel's statement, MPCN is not out of existence and is perfectly capable of asserting any claims it may have.

D. MPCN's Proceedings In European Forums

MPCN is *currently* prosecuting claims arising out of its alleged Heimdal Field losses against Statoil (the Norwegian state-owned oil company) and Statpipe in two separate European forums: (1) before the court in Stavanger, Norway, and (2) before the European Commission. Copies of the papers filed by MPCN in these proceedings are attached hereto as Exhibits 5 and 6. In those proceedings, MPCN alleges that:

- MPCN owns the interest in the Heimdal Field. Ex. 5 ¶ 1.3; Ex. 6 ¶ 9.
- MPCN is the joint venturer with Statoil. Ex. 5 ¶ 1.3.

- MPCN invested \$400,000,000 in the Heimdal Field. Ex. 6 ¶ 9.
- MPCN has suffered the negative effects of low prices and high tariffs. Ex. 5 ¶¶ 4.7, 4.8, 6.2, 8(2); Ex. 6 ¶ 24, 25, 26, 27, 36, 45, 63, 69, 70.
- The practices in dispute substantially affect trade between countries of the European Union and competition in the Common Market. Ex. 6. ¶¶ 63, 64.

Tellingly, those papers reveal that only MPCN (not MOC, MIOC, or Norge) is seeking relief in those proceedings with respect to matters which are also the subject of this case.

E. The Evidence Submitted In Support Of This Response

Ruhrgas AG submits in support of this Response the depositions of Plaintiffs' corporate representatives, John A. Evans, Burton B. Bossley, Jr., and Finn E. Engzelius (Exs. 1, 2 and 3), documentary evidence (Exs. 4-20, 22-63, 66) and legal authorities (Exs. 21, 64). The exhibits are separately bound in two volumes and have been filed concurrently with this Response. An index of the exhibits is set out in Appendix A. Ruhrgas AG also incorporates by reference the affidavits and documentary evidence attached to Ruhrgas AG's Notice of Removal (Instr. No. 1).

II.

SUMMARY OF ARGUMENT

Plaintiffs concede that Ruhrgas AG's removal was procedurally correct. Motion to Remand (Instr. No. 12) at 1. Plaintiffs challenge only the existence of removal jurisdiction.

Three separate and independent grounds of removal jurisdiction exist. Removal is proper (1) under 9 U.S.C §§ 203 and 205 because Plaintiffs are bound to arbitrate their claims pursuant to the Convention On the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2115, 330 U.N.T.S. 38 ("the Convention"); (2) on diversity jurisdiction grounds because Norge is not a real party in interest and/or because Norge was fraudulently joined to defeat diversity; and (3) because Plaintiffs' claims raise substantial questions of foreign and international relations, which are incorporated into and form part of the federal common law, creating federal question jurisdiction.

Initially, subject matter and removal jurisdiction exist under 9 U.S.C. §§ 203 and 205 because the claims which are the subject of this case are subject to mandatory arbitration pursuant to the Convention. Although the Court in its Memorandum and Order signed November 15, 1995 (Instr. No. 38) concluded that Plaintiffs are not bound by the arbitration clause contained in the Agreement, Ruhrgas AG respectfully submits that the Court should reconsider that conclusion based on the arguments and evidence presented in connection with Ruhrgas AG's Motion for Reconsideration (Instr. No. 39)

of that Order², which arguments and evidence are discussed in detail herein. First, Plaintiffs are bound to arbitrate under the Agreement under the "group of companies" doctrine which has developed in international arbitration by virtue of the fact that MOC and MIOC personnel, acting on behalf of MPCN, controlled the negotiation and execution of the Agreement as well as performance and arbitration under the Agreement. Second, Plaintiffs are bound under U.S. legal principles. The Court based its conclusion that Plaintiffs' are not bound to arbitrate on its determinations that Plaintiffs' claims are based on alleged conduct of Ruhrgas "in relation to [Plaintiffs], not in relation to MPCN" and are "independent" of any claims which MPCN might assert. Memorandum and Order (Instr. No. 38) at 7, 8-9. The deposition admissions of the corporate representatives of MOC and MIOC now show that whenever Marathon personnel dealt with Ruhrgas AG, they were doing so *on behalf of MPCN*, not MOC, MIOC, or Norge. Evans Depo. (Ex. 1) at 23-25, 30; Bossley Depo. (Ex. 2) at 40-46, 53-54, 59-60, 77-78. As a result, even if it is assumed that

² A series of filings have been made by the parties in connection with the Motion for Reconsideration. Those filings are as follows: (1) Motion for Reconsideration of Order Denying Motion for Stay Pending Arbitration (Instr. No. 39); (2) Plaintiffs' Response to Ruhrgas AG's Motion to Reconsider (Instr. No. 42); (3) Ruhrgas AG's Reply to Plaintiffs' Response to Ruhrgas AG's Motion to Reconsider (Instr. No. 47); (4) Plaintiffs' Surreply Brief Regarding Ruhrgas AG's Motion to Reconsider (Instr. No. 53); (5) Ruhrgas AG's Response to Plaintiffs' Surreply Brief Regarding Ruhrgas AG's Motion to Reconsider (Instr. No. 59).

Ruhrgas AG made misrepresentations to Marathon personnel (which Ruhrgas AG denies), such representations were made to MPCN. Additionally, a new affidavit from the secretary of MOC and MIOC, Mr. John Evans (Ex. 7), shows that Plaintiffs' claims are based on the contention that Ruhrgas AG's conduct harmed MPCN by rendering it unable to satisfy its obligations. Ex. 7 ¶¶ 8, 9. It is now undisputed that Plaintiffs' claims are based on conduct "in relation to MPCN" and are *not* "independent" of claims by MPCN. Plaintiffs are bound to arbitrate their claims, and this Court has subject matter jurisdiction under 9 U.S.C. §§ 203 and 205.

Diversity jurisdiction exists because Norge *does* not hold the substantive rights sought to be enforced in this case and therefore is not a real party in interest. Norge assigned away all of its rights in the Heimdal Field to MPCN in the 1970s, and has not exercised those rights since. Norge is an inactive company, conducting no business other than the filing of accounts of its assets and liabilities with the Norwegian government as required by Norwegian law. Engzelius Depo. (Ex. 3) at 11-20, 22-24. Those accounts (Exs. 8-19)³ reflect that the rights sought to be enforced in this case are not shown as assets of Norge. *Id.* at 72-77. The absence of any interest in Norge is also reflected in the proceedings MPCN has commenced in Europe, in which MPCN alleges that *it* owns the rights in the Heimdal Field and is the joint venturer with Statoil. Ex. 5 ¶ 1.3; Ex. 6 ¶ 9. While the assignment documents created a possibility of a future reversion of

³ Exhibits 8-19 were marked at the deposition of Mr. Engzelius as Deposition Exhibits 31-42.

those rights to Norge, such a reversion has not taken place, and may never take place. Engzelius Depo. (Ex. 3) at 59-60, 85-91. Norge at most holds a possibility of reverter which depends upon the occurrence of events beyond the control of Norge, an interest which does not give Norge standing to assert any claims herein. These facts show that Norge is not a real party in interest and should be disregarded in determining diversity.

Furthermore, Norge, for a number of independent reasons, has no possibility of recovery, making its joinder fraudulent: (1) Norge, as the holder of at most a possibility of reverter with respect to rights in the Heimdal Field, is not entitled to seek recovery of alleged damage to those rights; (2) Norge, which has not held the right to produce or sell Heimdal gas since the 1970s and has never had any dealings with Ruhrgas AG, itself has – engaged in no negotiations for prospective business relations having anything to do with the Heimdal Field; (3) Norge cannot assert a cause of action for any alleged tortious interference with the prospective business relations of MPCN; and (4) Norge has suffered no legally cognizable damages. On this last issue, it is undisputed that Norge had no anticipation that it would ever realize any value from rights in the Heimdal Field after it assigned the rights to MPCN. Engzelius Depo. (Ex. 3) at 52, 58. Norge's income, expenses, assets and liabilities have not been affected by any matters relating to the Heimdal Field. *Id.* at 72-83, 106-107, 109-110. The value of the rights in the Heimdal Field upon reversion to Norge (if such a reversion ever occurs) will turn on the pricing and transportation available at the time of reversion, not on that which was available while MPCN held the rights.

Id. at 96-97. The alleged conduct of Ruhrgas AG has had no economic impact on Norge and never will. Because Norge has no possibility of recovery, its joinder was fraudulent, and diversity therefore exists.

This Court also has removal jurisdiction because Plaintiffs' claims raise substantial questions of foreign and international relations, which are incorporated into and form part of the federal common law, creating federal question jurisdiction. The Federal Republic of Germany has submitted a Note Verbale to the United States State Department (Ex. 20) and has filed an Amicus Curiae Brief in this case (Instr. No. 58), both of which demonstrate that substantial international issues are raised by this litigation. In MPCN's European Commission proceeding, in which it complains of practices concerning prices and tariffs for Heimdal gas, MPCN asserts that "the alleged practices affect trade between Member States [of the European Union] and . . . competition in the Common Market must consequently be regarded as substantially affected." Ex. 6 ¶ 64. The substantial questions of foreign and international relations raised by this case confer federal question jurisdiction, supporting Ruhrgas AG's removal.

III.

THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS CREATES SUBJECT MATTER JURISDICTION

Among the provisions enacted by Congress in implementing the Convention were two provisions designed to insure that parties involved in disputes covered by the Convention would have access to the federal courts for rulings on Convention issues. Specifically, Congress conferred federal question jurisdiction on the federal courts over cases implicating the Convention, 9 U.S.C. § 203, and the right to remove to federal court any case within the scope of the Convention filed in state court, 9 U.S.C. § 205. These jurisdictional provisions were important to the ratification process because of the need for uniformity in the development of standards governing Convention cases. *McDermott International, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1210-12 (5th Cir. 1991).

Under 9 U.S.C. §§ 203 and 205, this court has subject matter jurisdiction of this case, and this case was properly removed to this court, because the claims asserted herein are subject to arbitration under the Convention. Although the Court issued an Order on November 15, 1995 (Instr. No. 38) denying Ruhrgas AG's Motion for Stay Pending Arbitration, Ruhrgas AG respectfully submits that the matters raised by Ruhrgas AG in connection with its pending Motion for Reconsideration (Instr. No. 39) of that Order, which are discussed in detail below, demonstrate that Plaintiffs are bound to arbitrate their claims under the Convention.

The Fifth Circuit has applied a four-prong test in determining whether a dispute is subject to arbitration under the Convention:

1. Is there an agreement in writing to arbitrate the subject of the dispute?
2. Does the agreement provide for arbitration in the territory of a signatory of the Convention?
3. Does the agreement arise out of a commercial legal relationship?
4. Is a party to the agreement not an American citizen?

Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1144-45 (5th Cir. 1985). If the district court resolves all four questions in the affirmative, the disputes must be resolved in arbitration. 767 F.2d at 1145.

There can be no dispute that the arbitration clause contained in Article 15 of the Agreement meets the second, third, and fourth requirements set out in *Sedco*. Article 15 of the Agreement expressly provides for arbitration in Stockholm, Sweden. Because Sweden is a signatory of the Convention, the second requirement of the *Sedco* test is satisfied. The Agreement clearly arises out of a commercial legal relationship, satisfying the third element of the *Sedco* test. The fourth element is satisfied because Ruhrgas AG is a German corporation with its principal place of business in Germany. This leaves the question whether there is an agreement in writing to arbitrate the subject of this dispute. As shown more fully below, this requirement is also satisfied.

A. The Writing Requirement is Satisfied

Plaintiffs argue that the Convention does not apply because (i) Plaintiffs did not sign the Heimdal Gas Sales Agreement, and (ii) Plaintiffs are not parties to any arbitration agreement with Ruhrgas AG. These arguments are inconsistent with Fifth Circuit authority.

The Fifth Circuit has rejected the argument that the Convention requires that the arbitration clause be contained in an agreement that has been signed by the party asserting the claim. In *Sphere Drake Insurance Plc v. Marine Towing, Inc.*, 16 F.3d 666 (5th Cir. 1994), the Court held that the plaintiff was bound to arbitrate its claims under an insurance policy even though the plaintiff had not signed the policy. 16 F.3d at 669. The court held that the "agreement in writing" requirement of the Convention is satisfied where there is an arbitral clause in a contract; a signature is not required. *Id.*

Similarly, there is no requirement under the Convention that the plaintiff and the defendant must be parties to the agreement containing the arbitration clause. In *Sedco v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d at 1144-45, the Fifth Circuit identified the relevant inquiry to be whether there is "an agreement in writing to arbitrate the dispute." The answer to this question turns on whether the plaintiff is bound by a written arbitration clause to arbitrate its claim. As shown below, Plaintiffs are bound to arbitrate the claims asserted in this case.

B. Plaintiffs are Bound to Arbitrate the Dispute

1. Plaintiffs are bound to arbitrate under the "group of companies" doctrine

In international arbitration, a doctrine known as the "group of companies" doctrine has developed. Under that doctrine, where a parent company exercises control over a subsidiary in the negotiation, execution, performance, and/or termination of an agreement containing an arbitration clause, the whole group of companies is bound by the arbitration clause in the agreement entered into by the subsidiary. Application of this doctrine is exemplified by *Dow Chemical v. Isover Saint Gobain*, Cour d' Appel, Paris, 21 October 1983, 110 J. 899 (1983) IX Yearbook 132 (1984) (English translation). The English translation version of this decision as published in the Yearbook of Commercial Arbitration, published by the International Council for Commercial Arbitration, is attached hereto as Exhibit "21".

In *Dow*, the threshold question was whether the claims of the Dow parent company, Dow Chemical Company, and its subsidiary Dow Chemical France (neither of which had signed distribution agreements executed by two other Dow companies which contained arbitration clauses) were arbitrable. The panel noted that the parent company, Dow Chemical Company, had "primary involvement" in the agreements and "was the pivot of the contractual relationship finally established between certain entities of its group and the distributors." IX Yearbook at 135. The panel also noted that Dow Chemical France "played in the execution of the contracts an equally preponderant role as it did in the establishment

of the contractual relations." The panel concluded that the claims of Dow Chemical Company and Dow Chemical France were arbitrable, stating:

[I]t is indisputable – and in fact not disputed – that Dow Chemical Company (USA) has and exercises absolute control over its subsidiaries having either signed the relevant contracts or, like Dow Chemical France, effectively and individually participated in their conclusion, their performance, and their termination. . . . [I]rrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality (*une réalité économique unique*) of which the arbitrable tribunal should take account when it rules on its own jurisdiction subject to Article 13 (1955 version) or Article 8 (1975 version) of the ICC Rules. . . . [T]he arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise. . . . [I]t is appropriate for the tribunal to assume jurisdiction over the claim brought not only by [the Dow affiliates which were parties to the arbitration agreements], but also by Dow Chemical Company (USA) and Dow Chemical France.

Id. at 136-37 (emphasis in original). In reaching this result, the panel noted that it was taking into account "the needs of international commerce." *Id.* at 136.

The award in the *Dow* arbitration was appealed to the Paris Court of Appeals, and the court affirmed the decision of the arbitrators. The court specifically referred to the "group of companies" doctrine, noting that "the existence of [the doctrine] according to the customs of the international trade has not been seriously contested by the defendant." *Id.* at 132. In the Amicus Curiae Brief which the Federal Republic of Germany has filed herein (Instr. No. 58) at 17-18, Germany specifically acknowledges the validity of the doctrine and its applicability to this case.

In an effort to distinguish *Dow*, Plaintiffs first argue that *Dow* involves the application of French law. The arbitrators, however, rejected the contention that French law governed the arbitrability issue, concluding that the parties' selection of the International Chamber of Commerce Rules ("ICC Rules") to govern arbitration issues allowed the arbitrators to apply international principles without reference to any particular nation's law. IX Yearbook at 133-34. The arbitration clause in the Agreement also references and incorporates the ICC Rules. Agreement ¶ 15.

Next, Plaintiffs argue that *Dow* is distinguishable on its facts because the question in that case was whether a non-signatory parent and a non-signatory affiliate could voluntarily assert claims in arbitration against a contract signatory. According to Plaintiffs, *Dow* merely stands for the proposition that where a non-signatory parent or affiliate of a signatory to the agreement voluntarily elects to assert claims in arbitration against another signatory to the agreement, arbitration is appropriate. The actual rationale of the decision in *Dow*, however, is set forth in

the decision itself, as quoted at length above. Most to the point is the determination that "the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies. . . ." *Id.* at 137. Plaintiffs' analysis of *Dow* cannot be reconciled with the rationale set forth in the decision.

In any event, Plaintiffs' argument is contrary to the basic rule of mutuality of contractual obligations. Apparently, Plaintiffs contend that Dow Chemical Company and Dow Chemical France could force the defendant to arbitrate, but the defendant could not force Dow Chemical Company and Dow Chemical France to arbitrate. There is no rational basis for such a rule. Either the parties to a dispute are bound to arbitrate their dispute, or they are not.

The principles applied in *Dow* are equally applicable here. MOC and MIOC personnel have consistently and exclusively controlled the operations of MPCN in the Heimdal field and MPCN's contractual relations with Ruhrgas AG and the other European buyers. The Marathon personnel involved in the Heimdal Field project were employees of MOC who were directed to deal with contractual matters under the Agreement on behalf of MPCN. Evans Depo. (Ex. 1) at 23-25, 30. The testimony and correspondence discussed below demonstrate the control of MOC and MIOC personnel in (a) the negotiation and execution of the Agreement, (b) matters relating to arbitration under the Agreement, (c) matters relating to settlement of disputes under the Agreement and (d) matters relating to performance under the Agreement.

a. Negotiation and execution of the Agreement.

In the arbitration between MPCN and Ruhrgas AG and the other European buyers commenced in 1987, Daniel J. Sullenbarger provided an Affidavit. Mr. Sullenbarger testified:

From August 1980, until September 1984, I was employed by Marathon Oil Company in its international organization as an attorney. During that period of time, I was on the *Marathon Oil Company team* which conducted Marathon Petroleum Company (Norway)'s gas sales negotiations with the Consortium of Gas Buyers.

Ex. 22 (emphasis added).⁴ This affidavit testimony makes it clear that the negotiations leading to the Agreement were conducted by a "Marathon Oil Company team" acting on behalf of MPCN. *Id.* As early as March of 1981, "Marathon Oil London" gave notice that "all necessary corporate approvals" related to the sale of the Heimdal gas to Ruhrgas AG and the other European buyers had been obtained. Ex. 23. The Heimdal Gas Sales Agreement was signed on behalf of MPCN by W. L. Kinney, who was President of MIOC and Vice-President, International Operations, of MOC. *See* Exs. 24, 25 and 26. In short, the negotiations leading to execution of the Heimdal Gas Sales Agreement were controlled by MOC personnel, and the Agreement was executed on behalf of MPCN by a high level executive in both MOC and MIOC.

⁴ The Affidavit of Mr. Sullenbarger (Ex. 22) was marked at the deposition of Mr. Bossley as Deposition Exhibit 15.

b. Arbitration Issues

MOC and MIOC personnel exercised complete control over all matters relating to arbitration under the Agreement. In connection with the dispute which ultimately led to the arbitration commenced in 1987, MOC board minutes reflect that "arbitration with the gas purchasers could go forward at the same time relief in pipeline tariffs is sought from the Norwegian Ministry of Energy." Ex. 27. Later, after the arbitration proceedings had been initiated, B. B. Bossley, Jr. sent a telex to Ruhrgas AG and the other European buyers directing that "in the future all communications to Marathon relative to the arbitration should be directed to my attention as follows: B. B. Bossley, Jr., Manager, Heimdal Project Team." Ex. 28. The telex is signed "B. B. Bossley, Jr., Manager, Heimdal Project Team, Marathon Int'l Oil Company-Houston." *Id.* (emphasis added). Mr. Bossley was also an officer of Marathon Oil Company; his business card described him as "Manager Heimdal Project Marathon Oil Company." Ex. 29.⁵ Mr. Bossley confirmed in his deposition that he "headed up" the Heimdal Project Team and that he "handled the arbitration for Marathon Petroleum Company (Norway)." Bossley Depo. (Ex. 2) at 16-17. Upon rendition of the arbitration award, MOC personnel handled the collection of the award from Ruhrgas AG and the other European buyers. Ex. 30. When disputes continued after the award by virtue of the European buyers' hardship claim, MOC personnel made arguments concerning the *res judicata* effect of the arbitration award

⁵ Mr. Bossley's telex (Ex. 28) and his business card (Ex. 29) were marked at his deposition as Deposition Exhibits 12 and 11.

and made a proposal which involved abstaining from the prosecution of a second arbitration case. Ex. 31.⁶ Subsequently, in January of 1994, in connection with a dispute which had arisen in connection with the gas tax side letter which was executed in connection with the May 1990 amendment to the Agreement, M. S. Strathman, in a letter written on Marathon Oil Company letterhead, stated:

If you do not pay our invoices or otherwise come to an agreement on the gas tax side-letter dispute, at present *we see no alternative but to take the issue to arbitration*. This is not our preferred option, but we are prepared to pursue it if necessary.

Ex. 32 (emphasis added). These Marathon documents demonstrate that MOC and MIOC personnel controlled the prosecution of the arbitration under the Agreement on behalf of MPCN and have actively threatened to initiate arbitration under the Agreement.

c. Amendments and Settlement Proposals

MOC and MIOC personnel made proposals and counter proposals on MOC and MIOC letterhead on behalf of MPCN for the settlement of the disputes which arose after the arbitration award, including proposals for an amendment to the Agreement. *See, e.g.*, Exs. 33 through 41. The settlement was approved by the Executive Committee of MOC. Ex. 42. The amendment was

⁶ Ex. 31 was marked at the deposition of Mr. Bossley as Deposition Exhibit 17.

executed by R. T. Chamblin, who was Vice-President, International Production, of MOC, as well as President of MPCN. Ex. 34; Bossley Depo. (Ex. 2) at 33. Later, in September of 1994, a Marathon representative made a proposal on MOC letterhead on behalf of MPCN for mutual termination of the Agreement and a new pricing mechanism. Ex. 43.

d. Performance Under the Agreement

When MPCN closed its Norway office, a telex was sent to the buyers dated December 8, 1986 directing that all further communications to MPCN be directed to Ralph D. Mathis. Ex. 44. Mr. Mathis signed the telex as "Joint Ventures Manager, Marathon Oil Company, Houston." *Id.* Mr. Richard Lewis submitted an affidavit in connection with the arbitration in which he testified: "I am presently senior joint interest representative for Marathon Oil Company and I am responsible for Marathon operations in the Heimdal Field. . . ." Ex. 45 (emphasis added). Mr. Lewis made a presentation to the Norwegian Minister of Energy in 1987 for the purpose of demonstrating "economic hardship resulting from the new price formula being imposed upon Marathon by the Consortium." *Id.* Various correspondence concerning operational and contractual matters has been sent over the years by both MOC and MIOC personnel on behalf of MPCN. *See, e.g.*, Exhibits 46 through 55. This correspondence included correspondence concerning pricing issues. *See* Exhibits 48, 49, 50, 51 and 55.

The documents and testimony of Marathon representatives described above demonstrate that MOC and

MIOC personnel have controlled the negotiation of the Agreement on behalf of MPCN, MPCN's operations in the Heimdal Field, MPCN's performance under the Agreement and dispute resolution under the Agreement. Under the "group of companies" doctrine, all of the Plaintiffs are bound to arbitrate disputes arising out of or relating to the Agreement, including those asserted in this lawsuit.

Because the "group of companies" doctrine recognized under international law renders all of the claims asserted herein arbitrable, it is unnecessary to analyze whether the claims would be arbitrable in a purely domestic context. The United States Supreme Court has recognized that international comity, respect for the capacities of a foreign and transnational tribunal, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that arbitration agreements entered into in international commercial transactions be enforced, irrespective of whether those agreements would be enforceable under domestic arbitration principles. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 630, 105 S.Ct. 3346, 3353 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 2455-57 (1974).

In *Scherk*, the U.S. Supreme Court held, due to the importance of arbitration in the international business arena, that claims under the Securities Exchange Act of 1934 arising out of an international transaction were arbitrable, even assuming that such claims would not be arbitrable in a domestic context. 94 S. Ct. at 2455-57. The Court relied heavily on the importance of arbitration

agreements in international transactions, noting the crucial role that arbitration agreements play in eliminating uncertainties as to the situs of and procedures governing dispute resolution and in insuring that disputes will be resolved in a neutral forum pursuant to mutually agreeable procedures. *Id.* at 2456-57. The Court held that denial of arbitration in an international transaction based on United States legal principles would defeat these important purposes and "would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Id.* The Court noted that a ruling that American standards must govern the controversy would "demean the standards of justice elsewhere in the world, and unnecessarily exalt the primacy of United States law over the laws of other countries." *Id.* at 2456 n. 11.

In *Mitsubishi Motors*, the U.S. Supreme Court applied these same international comity principles in holding antitrust claims arbitrable under an international arbitration agreement, even assuming that antitrust claims are non-arbitrable in a domestic context. 105 S. Ct. at 3355-60. The Court reaffirmed *Scherk* and restated its commitment to enforce international arbitration agreements even where U.S. legal principles would preclude arbitration. *Id.* at 3346.

Under the principles applied by the U.S. Supreme Court in *Scherk* and *Mitsubishi Motors*, the claims asserted herein are arbitrable under the "group of companies" doctrine recognized under international law, irrespective of whether the claims would be arbitrable under purely domestic arbitration principles in the United

States. However, as shown below, the same result is mandated by United States law.

2. Plaintiffs are bound to arbitrate under U.S. legal principles

In its Memorandum and Order signed November 15, 1995 (Instr. No. 38) denying Ruhrgas AG's Motion for Stay Pending Arbitration, the Court based its conclusion that Plaintiffs are not bound to arbitrate their claims on its determinations that Plaintiffs' claims are based on alleged conduct of Ruhrgas "in relation to [Plaintiffs], not in relation to MPCN," and are "independent" of any claims which MPCN might assert. Memorandum and Order (Instr. No. 38) at 7, 8-9. However, the admissions of the corporate representatives of MOC and MIOC now show that Plaintiffs' claims *are* based on alleged conduct "in relation to MPCN" and are *not* "independent" of any claims which MPCN might assert.

Plaintiffs' claims are based on alleged misrepresentations made by Ruhrgas AG during the course of its dealings with Marathon personnel. However, the corporate representatives of MOC and MIOC testified in deposition that when Marathon personnel dealt with Ruhrgas AG, they did so only *on behalf of MPCN*. Evans Depo. (Ex. 1) at 23-25, 30; Bossley Depo. (Ex. 2) at 40-46, 53-54, 59-60, 77-78. It is now undisputed that Plaintiffs' claims are based on representations made to Marathon personnel *while they were acting on behalf of MPCN*. While Plaintiffs also assert that Ruhrgas AG has tortiously interfered with efforts to market the Heimdal Field gas to others, the only Marathon affiliated company which allegedly has made

any efforts to market the gas *is MPCN*. First Amended Petition ¶ 46; *see also* Engzelius Depo. (Ex. 3) at 91. Additionally, Mr. Evans testified by affidavit that Plaintiffs' claims are based on the contention that Ruhrgas AG's conduct harmed MPCN by rendering it unable to satisfy its obligations. Ex. 7. Plaintiffs' purported claims *are* based on alleged conduct of Ruhrgas AG "in relation to MPCN," and are not "independent" of any claims of MPCN. As shown below, these undisputed facts demonstrate that Plaintiffs are bound to arbitrate their claims under United States legal principles.

a. The "virtual representation" doctrine renders Plaintiffs' claims arbitrable

In *In re Talbott Big Foot, Inc.*, 887 F.2d 611 (5th Cir. 1989), the Fifth Circuit suggested that a plaintiff who is not a party to the agreement containing the arbitration clause nevertheless may be bound if it is in privity with a party to the agreement such that an award in an arbitration under the agreement would have preclusive effect against the plaintiff under the virtual representation doctrine. 887 F.2d at 614 n.4. A circumstance in which the virtual representation doctrine will apply is where (1) a parent corporation or other affiliate has exercised control over the activities of its affiliate, and (2) the claims asserted by the parent are "identical" for *res judicata* purposes. *See Astron Industrial Associates, Inc. v. Chrysler Motors Corp.*, 405 F.2d 958, 961 (5th Cir. 1968). In fact, *Astron* is indistinguishable from this case and demonstrates that the virtual representation doctrine applies here.

Astron was the parent company of Transcontinental. Transcontinental was party to a contract with Chrysler under which Chrysler was to supply Transcontinental with automobile parts and supplies. Transcontinental filed a lawsuit against Chrysler on the grounds that Chrysler had breached the contract to supply automobile parts and had made false representations. Transcontinental subsequently filed a voluntary bankruptcy petition and the trustee in bankruptcy settled the case, resulting in a dismissal with prejudice. Subsequently, Astron filed a lawsuit remarkably similar to the claims made by Plaintiffs in this case. Astron "alleged that it purchased all of the stock of Transcontinental and advanced [Transcontinental] funds in reliance upon Chrysler's representations that it would supply Transcontinental with automobile parts and supplies. . . ." 405 F.2d at 960.

The Fifth Circuit held that Astron was in privity with Transcontinental under the virtual representation doctrine and that its claims were barred by the doctrine of *res judicata*. *Id.* at 960-62. In addressing the first element, that of control, the court noted that "Astron completely controlled Transcontinental as its sole shareholder, an officer of Astron operated Transcontinental, and the Board of Directors of Astron authorized the initial lawsuit by Transcontinental against Chrysler." *Id.* at 961. As shown above, the degree of control exercised by MOC and MIOC personnel over MPCN was at least as great as that exercised in *Astron*, and the first element of the "virtual representation" doctrine is satisfied.

In addressing the second element, identity of claims, the Fifth Circuit in *Astron* noted the following:

In both suits the *only* wrong which Chrysler allegedly committed was its failure to supply automobile parts and supplies to Transcontinental. . . . Whether the theory of recovery be misrepresentation to Transcontinental, misrepresentation to Astron, breach of contract with Transcontinental, or breach of contract with Astron, the operative wrong remains the same, the evidence necessary to sustain the allegation is the same, and a different judgment in this suit would impair rights under the earlier dismissal.

Id. at 962 (emphasis in original).

The same principles apply here. The "wrong" allegedly committed by Ruhrgas AG is the alleged failure to pay MPCN a premium price. Plaintiffs' own characterization of their claims confirms this:

Ultimately, Ruhrgas refused to pay the promised premium price, and MPCN (the Marathon affiliate through which Heimdal's development and its attendant gas sales were accomplished) had no means of repaying the advances made to it by Marathon and MIOC. Marathon and MIOC now have suffered tremendous resulting losses.

Plaintiffs' Brief in Support of Their Motion to Remand (Instr. No. 13) at 4. It is undisputed that any alleged representations made to Marathon personnel by Ruhrgas AG were allegedly made while those Marathon personnel were acting *on behalf of MPCN*. Evans Depo. (Ex. 1) at 23-25, 30; Bossley Depo. (Ex. 2) at 40-46, 53-54, 59-60, 77-78. Similarly, the tortious interference claims are based on alleged interference with MPCN's efforts to market the gas to others. First Amended Petition ¶ 46. The recent affidavit of Mr. Evans submitted by Plaintiffs (Ex. 7)

demonstrates that the heart of this case is Plaintiffs' claim that Ruhrgas AG disabled MPCN from repaying its obligations. Ruhrgas AG respectfully submits that this Court's conclusion in its November 15, 1995 Order (Instr. No. 38) at 9-10, that the claims asserted by Plaintiffs are "independent" of those of MPCN for purposes of applying the virtual representation doctrine, is contrary to the undisputed facts which have now been developed, and is inconsistent with *Astron*, which is indistinguishable from the facts of this case.⁷

Without challenging the applicability of the *Astron* analysis on the "identity of claims" issue, Plaintiffs attempt to distinguish *Astron* by arguing that Transcontinental had actually asserted claims against Chrysler, whereas here, MPCN has not pursued any claims against Ruhrgas AG. However, MPCN's failure to assert claims against Ruhrgas AG can only be explained as procedural maneuvering designed to unilaterally defeat Ruhrgas AG's right to arbitration. The testimony of Plaintiffs' own corporate representatives demonstrates that the Marathon personnel to whom the alleged misrepresentations were made were acting on behalf of MPCN. The alleged

⁷ The arguments for application of the virtual representation doctrine are even stronger here than in *Astron*. As noted above, Plaintiffs' own characterization of the claims demonstrates that those claims are derivative from harm allegedly suffered by MPCN. The Fifth Circuit has held that the virtual representation doctrine applies as a matter of law where the damage claims asserted are derivative. *Terrell v. DeConna*, 877 F.2d 1267, 1271 (5th Cir. 1989). See also *Akin v. Pafec Limited*, 991 F.2d 1550, 1560 (11th Cir. 1993) (shareholder in privity with corporation where shareholder's damages were derivative from harm suffered by corporation).

"wrong" committed by Ruhrgas AG was the alleged failure to pay a premium price to MPCN. The tortious interference claims are based on alleged interference with MPCN's marketing efforts. Plaintiffs are not asserting that MPCN has no claims arising out of the conduct which is the subject of this case, only that MPCN has chosen not to assert those claims. If this argument is valid, MOC and MIOC, which have the ability to control and have controlled MPCN's actions in matters concerning the Agreement, can unilaterally defeat Ruhrgas AG's right to arbitration by causing MPCN to withhold its claims. Such a result would favor form over substance and would reward procedural maneuvering. Under *Astron*, Plaintiffs are in privity with MPCN under the virtual representation doctrine. Plaintiffs are bound to arbitrate their claims.

b. Other U.S. authorities demonstrate that Plaintiffs are bound to arbitrate

Ruhrgas AG has previously cited several cases providing independent support for its position that Plaintiffs are bound to arbitrate their claims under U.S. legal principles. See Memorandum in Support of Ruhrgas AG's Motion for Stay Pending Arbitration (Instr. No. 7) at 9-13. Ruhrgas AG will not repeat its discussion of all of those authorities, but will discuss two of those cases in light of the evidence which has been submitted to the Court in connection with Ruhrgas AG's Motion for Reconsideration (Instr. No. 39), which evidence is discussed in detail herein. The following cases demonstrate that given the evidence which has now been fully developed and the

nature of the claims asserted, Plaintiffs are bound to arbitrate their claims.

- i. *Ripmaster v. Toyoda Gosei, Co., Ltd.*, 824 F. Supp. 116 (E.D. Mich. 1993).

In *Ripmaster*, the plaintiff was an individual who was employed by a company which had entered into a consultation agreement with the defendant providing for arbitration. The plaintiff claimed that his fraudulent misrepresentation, unjust enrichment, and promissory estoppel claims against the defendant were not subject to arbitration because he was not a party to the consultation agreement. The court rejected this argument and held that the claims were subject to arbitration under the consultation agreement. 824 F. Supp. at 117-18. The court noted that even though the plaintiff was *not* a party to his employer's contract with the defendant, he was properly characterized as a third-party beneficiary to the contract for purposes of determining arbitrability, and was therefore bound by the arbitration clause, because he was claiming that the defendant failed to pay money to his employer, which resulted in the employer not paying money to the plaintiff. 824 F. Supp. at 117-18.

In the November 15, 1995 Order, this Court distinguished *Ripmaster* by stating:

It appears from the opinion, however, that the plaintiffs damages were due to the defendant's alleged breach of the contract with the employer. *Id.* at 118. In the instant case, Marathon's claims are based on representations and actions by Ruhrgas *in relation to Marathon, not in relation to MPCN.*

Memorandum and Order (Instr. No. 38) at 8 (emphasis added). Ruhrgas AG respectfully submits that it is now undisputed that Plaintiffs' claims *are* based on alleged representations and actions by Ruhrgas AG "in relation to MPCN." The corporate representatives of MOC and MIOC have now confirmed that all MOC and MIOC personnel dealing with Ruhrgas AG were doing so *on behalf of MPCN*. Evans Depo. (Ex. 1) at 23-35; Bossley Depo. (Ex. 2) at 40-46, 53-54, 59-60, 77-78. Any representations made by Ruhrgas AG during those dealings would have been made *to MPCN*. Furthermore, the alleged wrong is the failure to pay a premium price *to MPCN*. The essence of Plaintiffs' claims is that Ruhrgas AG broke its alleged promises *to MPCN* and that MPCN was so adversely affected that it was rendered unable to make payments on its obligations, which Plaintiffs contend would have ended up in the coffers of MOC and MIOC in the form of dividends. Given these undisputed facts, Ruhrgas AG respectfully submits that the claims asserted by Plaintiffs *are* based on alleged representations and actions "in relation to MPCN." *Ripmaster* is not distinguishable.

- ii. *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988).

J.J. Ryan alleged that Rhone Poulenc committed tortious acts in causing its affiliates to terminate distribution agreements, each of which contained an arbitration clause. J.J. Ryan argued that the claims were not arbitrable because it had no arbitration agreement with Rhone Poulenc. The Fourth Circuit analyzed each of the various

tort claims and concluded that each was subject to arbitration under the arbitration clause contained in the distribution agreements, notwithstanding the fact that Rhone Poulenc was not a party to those agreements. *Id.* at 318-22.

In its November 15, 1995 Order (Instr. No. 38), this Court distinguished *J.J. Ryan*, stating that the defendant in *J.J. Ryan* "was trying to enforce arbitration on a party who had at least agreed to arbitrate its claims with the subsidiaries." Memorandum and Order (Instr. No. 38) at 7. This Court noted that Ruhrgas AG "is trying to force arbitration on the Plaintiffs, who have not consented to arbitration with anyone." *Id.*

Ruhrgas AG respectfully submits that this distinction is not valid, particularly in light of the facts which have now been developed and submitted to the Court in connection with the Motion for Reconsideration (Instr. No. 39) filed by Ruhrgas AG, which are discussed in detail herein. MOC and MIOC personnel controlled the negotiation and execution of the Agreement, which contained the arbitration clause. Plaintiffs' purported claims are based on alleged misrepresentations made to MOC and MIOC personnel while acting *on behalf of* MPCN, and alleged interference with the marketing efforts of MPCN. The claims are based on contentions that MPCN has suffered harm, rendering MPCN unable to make payments which ultimately would allegedly flow through to MOC and MIOC in the form of dividends. In negotiating and executing the Agreement on behalf of MPCN, MOC and MIOC personnel clearly understood and agreed that claims based on allegations that Ruhrgas AG had wrongfully harmed MPCN would be resolved in arbitration.

Under these unique circumstances, the Fourth Circuit's observation is equally applicable here: "If the [defendant] was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted." 863 F.2d at 321 (quoting *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976)).

The distinction of *J.J. Ryan* relied on by the Court would lead to an anomalous result. Under this Court's analysis of *J.J. Ryan*, Plaintiffs could compel Ruhrgas AG to arbitrate the claims which are the subject of this case, but Ruhrgas AG cannot compel Plaintiffs to arbitrate. Either the disputes which are the subject of this case are arbitrable, or they are not. For all of the reasons set forth above, Ruhrgas AG respectfully submits that the Court should find that Plaintiffs are bound to arbitrate their claims under the arbitration clause contained in the Agreement.⁸

C. Conclusion

The claims asserted in this case are based on alleged conduct of Ruhrgas AG directed at Marathon personnel acting *on behalf of* MPCN concerning the adequacy of payments made to MPCN which allegedly rendered

⁸ While Plaintiffs have also argued that their claims are not within the scope of the arbitration clause set out in Article 15 of the Agreement, this Court, citing *Snap-On Tools Corp. v. Mason*, 18 F.3d 1261, 1265 (5th Cir. 1994), correctly rejected those arguments in the November 15, 1995 Order (Instr. No. 38) at 4 n.1.

MPCN unable to pay its obligations. The MOC and MIOC personnel who negotiated the Agreement on behalf of MPCN clearly agreed that such disputes would be resolved in arbitration under the ICC Rules in Sweden. To allow the Marathon group of companies to avoid the obligation to arbitrate these disputes through the procedural maneuvering which has occurred in this case would allow the corporations of the world to make a mockery of the enforceability of arbitration clauses under the Convention. *See* Note Verbale (Ex. 20) at 2. Any arbitration agreement could be circumvented by having a parent company or other affiliate assert claims for indirect derivative damages resulting from the alleged wrongful conduct. Given that the enforcement of arbitration agreements under the Convention is an important function of the federal courts, *McDermott International, Inc.*, 944 F.2d at 1207-13, and given the important role that arbitration clauses play in the "achievement of the orderliness and predictability essential to any international business transaction," *Scherk*, 417 U.S. at 516, such circumvention should not be permitted. Plaintiffs are bound to arbitrate their claims under the Convention, and this Court has subject matter jurisdiction under 9 U.S.C. § 203 and § 205. The Motion to Remand should be denied.

IV.

DIVERSITY JURISDICTION EXISTS BECAUSE NORGE IS NOT A REAL PARTY IN INTEREST AND WAS FRAUDULENTLY JOINED

MOC and MIOC are U.S. citizens for diversity purposes; Ruhrgas AG is a foreign citizen. Plaintiffs contend that the presence of Norge as a Plaintiff destroys diversity because Norge is a Norwegian corporation. However, Norge's mere presence as a Plaintiff does not end the inquiry.

Removal of a case to a federal district court is appropriate if diversity of citizenship exists among the "*parties in interest properly joined*." 28 U.S.C. § 1441(b) (emphasis added). If the Court determines *either* (1) that Norge is not a real party in interest, *or* (2) that Norge has been fraudulently joined, the citizenship of Norge must be ignored for jurisdictional purposes. *See Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 460-61 (1980) (jurisdiction rests only upon the citizenship of real parties in interest); *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995) (court must ignore fraudulently joined party for jurisdictional purposes). As shown below, these two independent inquiries yield the same result: Norge must be ignored in determining whether diversity exists in this case.

A. Norge is Not a Real Party in Interest

The 'real party in interest' is the party holding the substantive right sought to be enforced. *Farrell Const. Co. v. Jefferson Parish*, 896 F.2d 136, 140 (5th Cir. 1990). In

this case, Norge purports to seek enforcement of rights under the Heimdal Field Production License granted by the Norwegian government and under an alleged joint venture agreement with Statoil. As shown more fully below, Norge assigned its rights under both the Production License and the alleged joint venture agreement to MPCN in the 1970s and has not held those rights since. Norge is an inactive company which has not conducted any business since it assigned its rights to MPCN. Because Norge does not hold the substantive rights sought to be enforced, Norge is not a real party in interest.

1. Norge Assigned All of its Rights and Benefits Under the Production License and Operating Agreement to MPCN

The Norwegian government issued a license to Norge⁹ and three other companies "to explore for and produce petroleum" in the Heimdal Field in 1971. Petroleum Production License No. 36, ¶ 1 (hereinafter "Production License") (Ex. 56).¹⁰ In June 1975, Norge entered into an Operating Agreement with the other interest owners under the Production License. (Ex. 57). The Operating Agreement is the purported "joint venture agreement" referenced in the First Amended Petition. Bossley Depo. (Ex. 2) at 66-67.¹¹ Also in June 1975, Norge

⁹ Norge was originally named Pan Ocean Norge A/S. Engzelius Depo. (Ex. 3) at 24-25.

¹⁰ The Production License (Ex. 56) was marked as Deposition Exhibit No. 23 at Mr. Engzelius' deposition.

¹¹ The Operating Agreement was amended on three occasions. Bossley Depo. (Ex. 2) at 68-69. The amendments,

assigned to MPCN all rights, benefits, obligations, and duties under the Production License and the Operating Agreement.¹² The terms of this assignment are evidenced in a Pass Through Agreement dated June 25, 1975 (Ex. 61), which was supplemented with a substantively identical Pass Through Agreement effective January 1, 1978 (Ex. 62) (collectively, "Pass Through Agreements"). The Pass Through Agreements provide, in relevant part:

In return for [MPCN's] performance of its obligations, . . . [MPCN] shall own and receive without additional compensation *all the rights* of [Norge] to all the petroleum which may be produced and accumulated under the Production License, and [MPCN] shall be substituted for [Norge] to the extent indicated herein in the Production License, Operating Agreement and Accounting Agreement, as if [MPCN] were expressly named as a party to said Agreements, and [MPCN] shall assume *all the rights, benefits, obligations and duties of [Norge] under said License and Agreements.*

Pass Through Agreements (Exs. 61 and 62) ¶ 3 (emphasis added). By way of the Pass Through Agreements, Norge unambiguously assigned all rights under the Production License and the Operating Agreement to MPCN. In the July 1980 amendment to the Operating Agreement, the parties expressly acknowledged that under the Pass

which were marked during Mr. Bossley's deposition as Deposition Exhibits 20-22, are attached hereto as Exs. 58, 59, and 60.

¹² At the time of the assignment, MPCN was known as Pan Ocean Oil Corporation (Norway). Engzelius Declaration (Ex. 63) ¶ 7.

Through Agreements, MPCN "receives all the rights and benefits attributable to [Norge's] interest under the Production License No. 036 and the [Operating] Agreement." Ex. 59 ¶ 5. Mr. Engzelius, Norge's chief executive officer and general manager,¹³ admitted in his deposition that the Pass Through Agreements remain in effect and have been in effect at all times since their execution. Engzelius Depo. (Ex. 3) at 61, 80. By virtue of the Pass Through Agreements, Norge does not hold and has not held since the 1970s any of the substantive rights and benefits granted by the Production License or the Operating Agreement. Mr. Engzelius admitted in his deposition that the right to explore for, produce, and market the Heimdal Field gas has not been held by Norge at any time since execution of the Pass Through Agreements. *Id.* at 59-60. In fact, Norge has been an inactive company, with no employees, which conducts no business whatsoever. *Id.* at 11-20, 22-24; *see also* Exs. 8-19. Even if it is assumed for purposes of argument that Norge continues to hold bare legal title to the Production License, a holder of "naked legal title, with no actual interest or control over the subject-matter of the litigation," is not a 'real party in interest' and does not affect diversity jurisdiction.

¹³ While Mr. Engzelius holds these titles, he is an outside Norwegian lawyer for Marathon who bills his time spent on Norge matters at his normal hourly rate. Engzelius Depo. (Ex. 3) at 12-15, 18-20. The Chairman of the Board for Norge is one of Mr. Engzelius' law partners. *Id.* at 20. The address of Norge as reflected on its company certificate is the address of Mr. Engzelius' law firm. *Id.* at 18. Mr. Engzelius was designated by Norge as the corporate representative to testify on the jurisdictional issues. *Id.* at 4-5, 9.

Stonybrook Tenants Association, Inc. v. Alpert, 194 F. Supp. 552, 556 (D. Conn. 1961).

In short, while Norge seeks to enforce substantive rights under the Production License and the Operating Agreement, Norge assigned those rights to MPCN pursuant to the Pass Through Agreements, which Norge admits are still in effect. Because Norge does not hold the substantive rights sought to be enforced, Norge is not a real party in interest. *Farrell Const.*, 896 F.2d at 140.

2. If Norge Holds Anything, it is Nothing More Than a Possibility of Reverter, Which Does Not Make Norge a Real Party in Interest

Plaintiffs attempt to avoid the Pass Through Agreements by arguing that Norge retains a "remainder" interest, or alternatively, a "reversionary" interest in the Production License and Operating Agreement by virtue of paragraph 9 of the Pass Through Agreements, which provides:

If [MPCN] defaults on any provisions of this Agreement, [Norge] shall have the right to terminate the Agreement with immediate effect.

Pass Through Agreements (Exs. 61 and 62) ¶ 9. However, Mr. Engzelius admitted in his deposition that (1) MPCN has not defaulted; (2) Norge has not terminated the Pass Through Agreements; (3) Norge has not had and does not have the current right to terminate the Pass Through Agreements; and (4) Norge may never terminate the Pass Through Agreements. Engzelius Depo. (Ex. 3) at 78-80, 85-91. As shown below, the speculative possibility that Norge *may* at some future date terminate the Pass

Through Agreements and reacquire the rights under the Production License and the Operating Agreement does not make Norge a real party in interest in this case.

As a threshold matter, Plaintiffs mischaracterize Norge's speculative possibility of reacquiring the rights under the Production License as a "remainder." Plaintiffs' Brief in Support of Their Motion to Remand (Instr. No. 13) at 4. Norge cannot hold a remainder interest in the Production License because the grant of a "remainder" creates an interest in a third party and cannot be reserved by a grantor. *Bradford v. Rain*, 562 S.W.2d 514, 518 (Tex. Civ. App. – Texarkana 1978, no writ); 31 C.J.S. *Estates* § 68 at 142. Plaintiffs alternatively assert that Norge retained a reversionary interest in the Production License. Plaintiffs' Brief in Support of Their Motion to Remand (Instr. No. 13) at 4. A "reversionary interest" is any future interest left in a grantor or his successors. RESTATEMENT OF THE LAW OF PROPERTY § 154 (1936); 31 C.J.S. *Estates* § 105 at 203; 2A RICHARD R. POWELL, POWELL ON PROPERTY ¶ 270[1] (Patrick J. Rohan ed. 1995).

There are, however, two types of reversionary interests: a "reversion" and a "possibility of reverter." RESTATEMENT OF THE LAW OF PROPERTY, § 154. A "reversion" exists in a grantor when it is certain that the interest will revert to the grantor at a future date. *Id.* A "possibility of reverter," on the other hand, is the interest retained if the grant might remain in effect forever, or instead might terminate if a specified contingency occurs. *Id.*; *Luckel v. White*, 819 S.W.2d 459, 464 (Tex. 1991); *Davis v. Skipper*, 83 S.W.2d 318, 320 (Tex. Comm'n App. – 1935, opinion adopted); *James v. Dalhart Consol. Indep. School Dist.*, 254 S.W.2d

826, 829 (Tex. Civ. App. – Amarillo 1952, writ ref'd); 31 C.J.S. *Estates* § 105 at 203.

The distinction between a "reversion" and a "possibility of reverter" is important where a question concerning the right to assert a lawsuit is raised, because "[t]he holder of a bare possibility of reverter cannot maintain an action for injury to the property and may not join as a party plaintiff in such an action." 31 C.J.S. *Estates* § 105, at 205;¹⁴ *see also Layne Louisiana Co. v. Superior Oil Co.*, 26 So.2d 20, 24 (La. 1946) (where interest in minerals might never revert to plaintiff, plaintiffs interest was too speculative to form the basis for an award of damages); *Hopper v. Barnes*, 45 P. 874, 876 (Cal. 1896) (holder of possibility of reverter not entitled to maintain an action for injury to property); *cf. Davis v. Skipper*, 83 S.W.2d at 320 (holder of possibility of reverter in minerals may not maintain action against holder of possessory interest in minerals for waste). The RESTATEMENT OF THE LAW OF PROPERTY specifically provides that with respect to both real property and personal property interests, an action for damages for injury to the property may be maintained by the holder of a future interest only if the future interest is an indefeasible reversion or an indefeasibly vested remainder. RESTATEMENT OF THE LAW OF PROPERTY § 214, cmt. b, § 215, cmt. c. A possibility of reverter is neither. *Id.* § 154. As shown below, even if it is assumed that Norge

¹⁴ Plaintiffs cite 31 C.J.S. *Estates* in their Brief in Support of Their Motion to Remand (Instr. No. 13) at 23, but neglect to mention the clear statement therein that the holder of a possibility of reverter may not bring an action for injury to the property.

holds a reversionary interest in the Production License, such an interest could only be characterized as a "possibility of reverter."

The Production License will revert to Norge *only* if MPCN defaults on a provision of the Pass Through Agreements, and only then if Norge elects to terminate the Pass Through Agreements under paragraph 9 thereof. Pass Through Agreements (Exs. 61 and 62) ¶ 9; see Engzelius Depo. (Ex. 3) at 78-80, 85-91. While Plaintiffs suggest in their Brief in Support of Their Motion to Remand that the rights under the Production License will revert to Norge in June 1996, the effective date of MPCN's attempted termination of the Agreement, Mr. Engzelius affirmatively refutes this assertion. Even if it is assumed that the Agreement terminates in June 1996 (a contention which Ruhrgas AG denies since all of the buyers have rejected such termination as invalid), Mr. Engzelius concedes that MPCN still may secure a new buyer for the Heimdal gas and retain all rights under the Production License. Engzelius Depo. (Ex. 3) at 85-86; Declaration of Finn E. Engzelius ¶ 9 (Ex. 63). Accordingly, any anticipation that Norge will regain the rights under the Production License in June 1996 is mere speculation. Mr. Engzelius admitted in his deposition testimony that it is impossible to say whether MPCN will ever default on its obligations under the Pass Through Agreements. *Id.* at 87. Mr. Engzelius acknowledged that the rights to explore for, produce, and market the Heimdal Field gas may never revert to Norge. Engzelius Depo. (Ex. 3) at 59-60, 85-91. The mere possibility that Norge someday may regain those rights is, at most, a possibility of reverter. As the holder of nothing more than a possibility of reverter,

Norge is not a real party in interest and must be disregarded in determining diversity jurisdiction.

B. Norge is Fraudulently Joined

In order to establish fraudulent joinder, the party seeking removal to federal court need not prove actual fraud; it is sufficient to show there is no possibility that the plaintiff will be able to establish a cause of action against the non-diverse defendant in state court. *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995). Although courts have traditionally applied fraudulent joinder where a party seeks to join a non-diverse defendant, the doctrine also applies where a non-diverse plaintiff joins the action to defeat diversity jurisdiction. See *Vidmar Buick Co. v. General Motors Corp.*, 624 F. Supp. 704, 707 (N.D. Ill. 1985); *Picquet v. Amoco Prod. Co.*, 513 F. Supp. 938, 943 (M.D. La. 1981).

In evaluating a fraudulent joinder claim, the court may "pierce the pleadings," and consider affidavits, deposition transcripts and other evidentiary material. *Burden*, 60 F.3d at 217. If the court concludes that there is no possibility that the state court would recognize a valid cause of action, the claim is fraudulent and will not preclude removal. *Id.* at 217-18.

Even accepting Plaintiffs' factual allegations as true (and they are not), there is no possibility that Norge could prevail on its tort claims against Ruhrgas AG in Texas state court. Accordingly, Norge is fraudulently joined and must be ignored for purposes of diversity jurisdiction.

1. Norge Has No Possibility of Recovery Because It Does Not Hold the Substantive Rights Sought to be Enforced

As shown above, Norge assigned to MPCN in the 1970s the substantive rights sought to be enforced in this case. Even if it is assumed that paragraph 9 of the Pass Through Agreements creates a reversionary interest in Norge in the Production License and Operating Agreement, such a reversionary interest could only be characterized as a possibility of reverter because it is undisputed that the rights thereunder may never revert to Norge. Engzelius Depo. (Ex. 3) at 78-80, 85-91. As previously discussed, a holder of a possibility of reverter may not bring a tort claim for alleged injury to the property because of the speculative nature of the interest. As a result, Norge has no possibility of recovering on its claims in state court, and must be ignored for purposes of diversity jurisdiction. *Burden*, 60 F.3d at 217-18.

2. Norge's Claims Also Fail For Other Independent Reasons

While the First Amended Petition is less than clear, it appears that the specific claims asserted by Norge are for tortious interference and for participation in a breach of fiduciary duty. Norge has no possibility of recovery on either of these claims, independent of the fact that Norge owns no legally protectable interest.

a. Norge's Purported Tortious Interference Claims

In Plaintiffs' First Amended Petition, Plaintiffs assert that Ruhrgas AG has allegedly interfered with the prospective business relations of "Marathon's affiliate," MPCN. Plaintiffs' First Amended Petition ¶¶ 42-48. Curiously, Plaintiffs now contradict the First Amended Petition by contending that Norge is seeking damages for Ruhrgas AG's alleged "interference with Norge's ability to realize the value of its license." Plaintiffs' Brief in Support of Their Motion to Remand (Instr. No. 13) at 5. Although this latter assertion is not supported by the First Amended Petition, it is immaterial whether the tortious interference claim relates to alleged interference with Norge's prospective business relations and/or to alleged interference with MPCN's prospective business relations, because Norge has no possibility of recovery on either claim as a matter of law.

i. Tortious Interference With MPCN's Prospective Business Relations

A corporation cannot pursue a claim for tortious interference with the business relations of its affiliate. *Diesel Systems, Ltd. v. Yip Shing Diesel Engineering Co., Ltd.*, 861 F. Supp. 179, 181 (E.D.N.Y. 1994); *Osborn v. Bell Helicopter Textron, Inc.*, 828 F. Supp. 446, 450-51 (N.D. Tex. 1993). It is axiomatic that a plaintiff "generally must assert his own legal rights and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Norge has no

possibility of recovery on a claim for tortious interference with MPCN's business relations.

ii. Tortious Interference With Norge's Prospective Contractual Relations

Plaintiffs assert in their Brief (but not in their First Amended Petition) that Ruhrgas is interfering "with Norge's ability to realize the value of its license." Plaintiffs' Brief in Support of Their Motion to Remand (Instr. No. 13) at 5. This allegation is curious in light of Mr. Engzelius' admission that there has been no contact whatsoever between Ruhrgas AG and Norge on transportation issues or any other issue for that matter. Engzelius Depo. (Ex. 3) at 107-8. In any event, these allegations cannot support any recovery in favor of Norge in light of the undisputed facts of this case.

A claim for tortious interference requires a "reasonable probability" that the plaintiff would have entered into a contractual or business relationship absent interference by the defendant. *Conticommodity Services, Inc. v. Ragan*, 63 F.3d 438, 443 (5th Cir. 1995). A plaintiff asserting such a cause of action "must show that negotiations . . . were under way and appeared likely to succeed or reasonably certain to result in a contract advantageous to the [plaintiff]." *United Teacher's Associates v. Mackeen & Bailey, Inc.*, 847 F. Supp. 521, 535 (W.D. Tex. 1994). It is undisputed that Norge has not engaged in any negotiations to contract with a third party to market and/or sell the gas from the Heimdal field. Engzelius Depo. (Ex. 3) at 91. In fact, Mr. Engzelius admitted that Norge currently does not have the right to secure a buyer for the

Heimdal gas. *Id.* at 60. Further, Norge has not engaged in any negotiations to convey any reversionary interest. *Id.* at 98. In the absence of negotiations, there can be no reasonable probability that Norge would have been successful in negotiating a sale of the gas or a sale of any interest which it may hold. *United Teacher's*, 847 F. Supp. at 535. As a matter of law, Norge has no possibility of prevailing on a claim for interference with its own prospective business relations, even if Norge's standing problems are disregarded and even if it is assumed that such a claim is set forth in the First Amended Petition, which it is not.

iii. No Damages

One of the elements for recovery on a cause of action for interference with prospective business relations is the existence of actual damages. *Ragan*, 63 F. 3d at 443. The undisputed facts demonstrate that Norge has suffered none.

Mr. Engzelius testified that pass through arrangements of the type utilized by Marathon with respect to the Heimdal Field were "general practice" in the 1970s and were designed to enable the producer to take advantage of U.S. tax benefits. Engzelius Depo. (Ex. 3) at 50-51. The plan was that the Norwegian company (Norge) would acquire the license and would assign the rights under the license to a U.S. affiliate (MPCN), which would develop the property, produce the gas, sell the gas, and realize all of the profits, until the field was fully depleted, taking advantage of the tax benefits available under U.S. law along the way. *Id.* at 50-52, 58. Mr. Engzelius

acknowledged that if the pass through arrangement utilized here proceeded as planned, Norge would never sell any gas from the Heimdal Field, and MPCN would realize all of the proceeds of sale of such gas until the field was depleted. *Id.* at 58. Norge never had any reasonable expectation of realizing any benefits in connection with the development of the Heimdal Field.

Consistent with the intent of the pass through arrangement, Norge in fact has not held the right to explore for, produce or sell gas in the Heimdal Field since the 1970s. Engzelius Depo. (Ex. 3) at 59-60. The income, expenses, assets, and liabilities of Norge have not been affected by any matters relating to the Heimdal Field. Engzelius Depo. (Ex. 3) at 72-83, 106-107, 109-110; Exs. 8-19. Norge has not been required to discharge any of the obligations under the Production License since the execution of the Pass Through Agreements, and may never be required to discharge any of those obligations. Engzelius Depo. (Ex. 3) at 78, 109-110, 119-121. These undisputed facts conclusively demonstrate that Norge has suffered no damages.

Norge asserts that it has future damages based on its contention that the value of its reversionary rights have been damaged. However, Norge had no reasonable expectation that it would ever realize *any* value from its alleged reversionary rights. As noted above, the intent of the pass through arrangement was to allow MPCN to fully develop the field until it was depleted, with Norge realizing *none* of the proceeds of sale. Engzelius Depo. (Ex. 3) at 58. In any event, the alleged wrongful conduct of Ruhrgas AG allegedly committed during the course of its dealings with MPCN could have no possible effect on

the value of the rights under the Production License and Operating Agreement, even if it is assumed for purposes of argument that such a reversion will occur in the future. Mr. Engzelius admitted that the value of the rights upon a reversion to Norge would not be affected by the price paid prior to the reversion. Engzelius Depo. (Ex. 3) at 96-97. Norge would be free to sell the gas to any buyer it chooses at a price that would be negotiated at arm's length. *Id.* at 97-98. Norge's right upon reversion to sell the gas at a freely negotiated price would exist notwithstanding anything that happened in the dealings between Ruhrgas AG and MPCN. *Id.* at 98. Ruhrgas AG's alleged failure to pay a premium price to MPCN could have no possible adverse effect on the value of the rights upon reversion to Norge (if such a reversion ever occurs). Finally, because the rights under the Production License and Operating Agreement may *never* revert to Norge, any alleged damage to the reversionary interest is too speculative to be recoverable. *Layne Louisiana Co. v. Superior Oil Co.*, 26 So.2d at 24; *Hopper v. Barnes*, 45 P. at 876; Restatement of the Law of Property § 214, cmt.b, § 215, cmt. c. As such, Norge has no damages, and therefore has no possibility of recovery on any tortious interference claim.

**b. Norge's Claim For "Participation" of
Ruhrgas AG in a Breach of Fiduciary Duty
by Statoil**

Norge apparently asserts a claim based on alleged participation of Ruhrgas AG in an alleged breach of fiduciary duty by Statoil. First Amended Petition ¶¶ 50-58. Ruhrgas AG has been unable to find any

authority suggesting that Texas recognizes a cause of action for participation in a breach of fiduciary duty by another. Judge Hittner, in *Resolution Trust Corp v. Bonner*, 1993 WL 414679 (S.D. Tex. June 3, 1993) (Ex. 64), also was unable to find any such authority and dismissed such a claim.

Nevertheless, even if it is assumed that such a cause of action exists, any such claim by Norge nevertheless fails as a matter of law. Norge assigned all of its rights under the Operating Agreement (the purported "joint venture agreement") to MPCN by way of the Pass Through Agreements. Pass Through Agreements (Exs. 61 and 62) ¶ 3. The July 1980 Amendment to the Operating Agreement expressly acknowledges that under the Pass Through Agreements, MPCN "receives all the rights and benefits attributable to [Norge's] interest under . . . the [Operating] Agreement." Ex. 59, ¶ 5. Mr. Engzelius admitted in his deposition that Norge's rights under the Operating Agreement are "suspended" by virtue of the Pass Through Agreements. Engzelius Depo. (Ex. 3) at 76. Even if it is assumed for purposes of argument that the Operating Agreement gives rise to fiduciary obligations on the part of the parties thereto, Norge has no rights relative thereto by virtue of the Pass Through Agreements.

This conclusion is consistent with the papers filed by MPCN in the proceedings which it has initiated in Stavanger, Norway against Statoil and the other owners of Statpipe. MPCN alleges in those proceedings that *MPCN is the joint venturer*. Exhibit 5 ¶ 1.3. Norge is not a party to those proceedings. Engzelius Depo. (Ex. 3) at 100. In fact, Mr. Engzelius testified that he was unaware

of any claims, demands, or allegations made against Statoil by Norge. *Id.* at 99. The MPCN filing in Stavanger not only makes it clear that Norge has no claims as a joint venturer, it demonstrates that the assertion of such claims in this proceeding by Norge could only have been motivated by a desire to defeat diversity. While a fraudulent motive is not necessary to establish fraudulent joinder, such a motive nevertheless is present here.

Finally, the fiduciary duty claims fail because of the absence of any cognizable damages. Absent damages, any claims based on breach of fiduciary duty fail as a matter of law. *Rowe v. Rowe*, 887 S.W.2d 191, 196 (Tex. App. - Fort Worth 1994 writ denied). The detailed discussion of the damage issues relevant to the tortious interference claims (*see supra* at 39-41) applies equally to the breach of fiduciary duty claims.

C. Conclusion

In summary, Norge does not own the substantive rights sought to be enforced in this case, and has not owned those rights at any relevant time. Those rights may never revert to Norge. Norge has engaged in no activities related to the Heimdal Field, and never expected to engage in any such activities. Norge's financial position has not been impacted whatsoever by any matters relating to the Heimdal Field. Norge had no reasonable expectation that it would ever realize any value from rights under the Production License or the Operating Agreement. Under these circumstances, Norge has no possibility of recovery, and Norge must be disregarded in determining whether diversity jurisdiction

exists. Because diversity exists in the absence of Norge, the Motion to Remand should be denied.

V.

FEDERAL QUESTION JURISDICTION EXISTS BECAUSE THE CASE RAISES QUESTIONS OF FOREIGN AND INTERNATIONAL RELATIONS WHICH ARE INCORPORATED INTO AND FORM PART OF THE FEDERAL COMMON LAW

A. Plaintiffs Misconstrue Ruhrgas AG's Third Basis of Removal Jurisdiction

Plaintiffs argue that Ruhrgas AG has improperly removed the action pursuant to the Foreign Sovereign Immunities Act ("FSIA"). Plaintiffs' Brief in Support of Their Motion to Remand (Instr. No. 13) at 8. Ruhrgas AG is *not* removing pursuant to the FSIA, which should have been apparent to Plaintiffs because Ruhrgas AG does not cite the FSIA anywhere in its removal notice. Rather, as shown below, Plaintiffs' claims raise substantial questions of foreign and international relations, which are incorporated into and form part of federal common law, creating federal question jurisdiction.

B. Foreign Relation Questions Create Federal Question Jurisdiction

Federal question jurisdiction in the action exists because of the serious foreign relations implications created by Plaintiffs' claims. For purposes of determining if a case is one "arising under" the Constitution or laws of the United States, the word "laws" includes federal common law. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100

(1972); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 112 (1987). It is well settled that claims raising questions of foreign relations are incorporated into federal common law. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964); *Republic of Philippines v. Marcos*, 806 F.2d 344, 352 (2d Cir. 1986), *cert. dismissed*, 480 U.S. 942, and *cert. denied*, 481 U.S. 1048 (1987); *Kern v. Jeppesen Sanderson, Inc.*, 867 F. Supp. 525, 531-32 (S.D. Tex. 1994); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 62-63 (S.D. Tex. 1994); *Grynberg Prod. Corp. v. British Gas P.L.C.*, 817 F. Supp. 1338, 1355 (E.D. Tex. 1993); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 112 (1987). Plaintiffs' claims raise such foreign and international concerns.

C. Plaintiffs' Claims Raise Substantial Questions of Foreign Relations

The existence and substantiality of the international and foreign relations questions raised by Plaintiffs' claims is demonstrated by the opposition of the Federal Republic of Germany to Plaintiffs' action as stated in a diplomatic note (Note Verbale) (Ex. 20), and in its Brief as Amicus Curiae in Support of Ruhrgas (Instr. No. 58). The Note Verbale identifies a number of substantial international and foreign relations concerns raised by Plaintiffs' claims:

- Germany has a strong public interest in secure and reasonably priced energy supplies. Because natural gas provides a substantial proportion of Germany's energy supplies and 80 percent of the gas must be imported, natural gas imports are a major

issue in national energy policy. Imports from Norway are particularly important. As Germany's Minister of Economics, Dr. Guenter Rexrodt, stated on April 20, 1994, in a public speech "For Germany, Norway is a particularly important partner in energy supplies. There is no other country from which we buy comparable quantities of energy (oil and gas). We do not see any reason for concern about our growing dependence on Norwegian energy supplies; *for it is founded on the sound and reliable basis of amicable political relations and close cooperation of the companies involved.*"

- Natural gas imports into Germany are governed by long-term import agreements to ensure an uninterrupted supply. On the German side, the agreements are concluded by companies that are monitored by the national energy authorities. Due to their long-term impact on economic stability, these agreements are subject to state approval pursuant to the German Foreign Trade and Payments Act.
- The gas pipelines linking Norwegian fields to Germany are an important issue for both states. The governments of Germany and Norway concluded bilateral treaties in 1974 and 1993 to define the sovereign powers of the two states with regard to the pipelines from the Norwegian continental shelf to the German coast.
- The government of the Federal Republic of Germany considers it extremely important that the terms and conditions of natural gas import agreements be strictly complied with.

If gas supplied by one European state to another European state gives rise to a dispute between the companies involved, such disputes must be settled in strict accordance with the contractual agreements so as to maintain confidence in the reliability of international trade relations. An energy-importing country like the Federal Republic of Germany must place special emphasis on this principle.

- If the legal opinion came to prevail that in international trade a party to a contract can avoid binding contractual agreements, such as, in this case, prices and the arbitration clause, by having affiliated companies not directly bound by these contractual agreements file an action for damages in a forum non conveniens and if such forum were to rule on the merits of the case, the reliability of international legal and commercial relation would be gravely affected.
- The availability of natural gas from Norwegian reserves for the German market is based on good and amicable relations between the Kingdom of Norway and the Federal Republic of Germany. *Since Norway has rich natural gas reserves and Germany is dependent on energy imports, disputes arising in connection with natural gas supplies from Norway to Germany may have undesirable affects on relations between the two countries.* It is not the least for this reason that the government of the Federal Republic of Germany deems it appropriate and essential to provide for the settlement of any dispute by arbitration in an

international court of arbitration. It is therefore standard practice in Europe to incorporate an arbitration clause in all agreements on natural gas imports from Norway. An attempt to bypass such an arbitration clause should be doomed to failure.

Ex. 20 (emphasis added). The Federal Republic of Germany shows in its Amicus Brief that "the critical national interests of Germany . . . are implicated in this case." Amicus Brief of Germany (Instr. No. 58) at 6 (emphasis added).

The substantial nature of the international interests at stake are further demonstrated by statements of Mr. Thorvald Stoltenberg, Norwegian Minister of Foreign Affairs: "Norwegian gas supplies are stable and dependable and thereby contribute to West European energy security. The foreign policy factor is also present in gas negotiations and Norwegian authorities will monitor these closely." Ex. 65 (emphasis added). In fact, the Federal Republic of Germany and Norway entered into a Protocol in 1976 concerning cooperation in the exploration, production, and transportation of hydrocarbons. Ex. 66.

Even MPCN has acknowledged the implications of the matters in dispute on foreign and international relations. In the European Commission Complaint served by MPCN against Statoil and Statpipe, MPCN notes that the Statpipe transportation system through which the Heimdal gas flows "provides one of the main links between the Norwegian Continental Shelf and the European Union and the only link between Heimdal and Continental Europe." Ex. 6 ¶ 63. MPCN also acknowledges that the

Heimdal gas represents approximately "13% of the Norwegian gas sold in the Common Market." *Id.* MPCN concludes that the matters in dispute "affect trade between Member States [of the European Union] and . . . competition in the Common Market must consequently be regarded as substantially affected." Ex. 6 ¶ 64. MPCN requests intervention of the European Commission to address matters which MPCN alleges will result in "restricted sources of supply for consumers in the European Union" and which are "clearly intolerable for the public interest." Ex. 6 ¶ 71.

A trio of recent Texas federal district court cases has held removal jurisdiction existed on federal question grounds when similar foreign and international interests were at issue. *Kern*, 867 F. Supp. at 531; *Sequihua*, 847 F. Supp. at 62-63; *Grynberg*, 817 F. Supp. at 1365. In *Kern*, *Sequihua*, and *Grynberg*, foreign sovereigns were *not* parties. Instead, the court in each case found that the subject matter of the dispute raised international and foreign relations concerns implicating federal question jurisdiction.

1. *Kern v. Jeppesen Sanderson, Inc.*, 867 F. Supp. 525 (S.D. Tex. 1994)

In *Kern*, the court held that there was an *independent* basis of federal question jurisdiction "because plaintiffs claims raise questions of foreign relations which are incorporated into federal common law." *Id.* at 531. The court noted "the fact that foreign countries are not specifically named in the lawsuit is *immaterial*." *Id.* (emphasis added). The foreign interest that sustained federal court

jurisdiction in *Kern* (which involved two airplane crashes in Nepal) arose from the interest of other countries in the subject matter of the suit:

The interest these foreign sovereigns have in regulating their aircraft, airlines and airspace outweighs any interest the United States may have in applying its own air safety regulations to these defendants. "[E]very State has complete and exclusive sovereignty over the air space above its territory." Convention on International Civil Aviation, article 1. They also control the standards for safety and airworthiness within their country. *Id.* at article 38. *Since the interests of foreign countries in this litigation are substantial, there is federal question jurisdiction.*

Id. at 532 (citing *Grynberg*, 817 F. Supp. at 1338, 1353-54) (emphasis added).

Plaintiffs offer an incomplete and inaccurate explanation of *Kern*, stating that plaintiffs' complaint in *Kern* arose under a "federal treaty" thereby creating federal question jurisdiction only on that ground. Plaintiffs' Brief in Support of Their Motion to Remand (Instr. No. 13) at 10 n.2. Although that was one basis of jurisdiction in *Kern*, the *Kern* court also found federal question jurisdiction existed, independently, because of the "international issues" in the case. *Kern*, 867 F. Supp. at 531-32.

2. *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S. D. Tex. 1994)

Sequihua involved an action brought by Ecuadoran citizens for pollution allegedly caused in Ecuador. *Id.* at 62. The *Sequihua* court held:

Based upon the important foreign policy implications of this case, upon the international legal principle that each country has the right to control its own natural resources, and the strong opposition expressed by the Republic of Ecuador to this litigation, the Court finds without reservation that Plaintiffs' state law claims, if well-pleaded, raise issues of international relations which implicate federal common law. Consequently, this Court has federal question jurisdiction and the motion to remand must be denied.

Id. at 63. Plaintiffs attempt to distinguish *Sequihua* by noting that plaintiffs' action "spurred a formal protest from that country's government." Plaintiffs' Brief in Support of Their Motion to Remand (Instr. No. 13) at 10 n.2. With the filing of the Note Verbale (Ex. 20) and Amicus Curiae Brief of the Federal Republic of Germany (Instr. No. 58), *Sequihua* is obviously not distinguishable in this respect.

3. *Grynberg Production Corp. v. British Gas Corp.*, 817 F. Supp. 1338 (E.D. Tex. 1993).

Grynberg involved a dispute over the right to develop mineral resources. *Id.* at 1341. The court found federal question jurisdiction based on the presence of substantial international relations questions, noting that "the government of the Republic of Kazakhstan has taken the time and effort to write this court with respect to this case." *Id.* at 1356.

This case implicates international relations. Under the authorities discussed above, federal question jurisdiction exists in this Court. The Motion to Remand should be denied.

VI.
CONCLUSION

Several independent bases exist for sustaining the removal of this case to federal court and denying Plaintiffs' Motion to Remand. For the reasons stated herein and in the Brief for the Federal Republic of Germany as Amicus Curiae in Support of Ruhrgas, the Court should deny Plaintiffs' Motion to Remand.

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REQUEST FOR ORAL ARGUMENT

Ruhrgas AG respectfully requests the opportunity to present oral argument on Plaintiffs' Motion to Remand.

/s/ Ben H. Sheppard, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on counsel of record for Plaintiffs by certified mail, return receipt requested this 8th day of February, 1996.

/s/ Ben H. Sheppard, Jr.
BEN H. SHEPPARD, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY,	§		
MARATHON INTERNATIONAL	§		
OIL COMPANY, and	§		
MARATHON PETROLEUM	§	CIVIL ACTION	
NORGE A/S	§	NO.	
	§	H-95-4176	
Plaintiffs,	§		
	§		
RUHRGAS, A.G.	§		
	§		
Defendant.	§		

PLAINTIFFS' REPLY BRIEF IN SUPPORT
OF THEIR MOTION TO REMAND

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

MARATHON OIL COMPANY,	§	
MARATHON INTERNATIONAL	§	
OIL COMPANY, and	§	
MARATHON PETROLEUM	§	CIVIL ACTION
NORGE A/S	§	NO.
Plaintiffs,	§	H-95-4176
	§	
RUHRGAS, A.G.	§	
Defendant.	§	

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO REMAND

Plaintiffs Marathon Oil Company ("MOC"), Marathon International Oil Company ("MIOC"), and Marathon Petroleum Norge A/S ("Norge") submit this reply brief in support of their Motion to Remand and renew their request for just costs including attorneys' fees.

Summary of Argument

Removal is a creature of federal statutes, all of which are strictly construed *against* removal. Because the very concept of removal runs counter to deeply embedded notions of state sovereignty and the plaintiff's right to

select its forum, *any* doubts concerning the facts or the controlling law are resolved in favor of remanding the case to the forum in which it was filed. Ruhrgas contends that this case is removable for three reasons: (1) because its arbitration agreement with Marathon Petroleum Company Norway ("MPCN") (an affiliate of Plaintiffs, but not a party to this case) allegedly creates a federal question pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards; (2) because this case supposedly raises "international issues" such that there must be federal question jurisdiction under federal common law; and (3) because Norge, the only non-diverse plaintiff, allegedly cannot possibly prevail on any claim, regardless of the facts. None of these assertions are true.

Ruhrgas' arbitration agreement with MPCN does not create federal question jurisdiction because that agreement has no application whatsoever to Plaintiffs. Plaintiffs never have agreed to arbitrate their claims and they are not parties to the arbitration agreement. Moreover, the terms of the arbitration agreement itself unambiguously *exclude* any application to Plaintiffs. Ruhrgas' attempt to rely on French authority referring to a "group of companies" doctrine is contrary to settled federal law and ignores the law of corporations and rules of contract interpretation as they are known in this country. This Court already has ruled that Ruhrgas' arbitration agreement with MPCN has no application here, and Ruhrgas' Response adds nothing new to this already over-briefed issue.

That Ruhrgas convinced its own government to file a Note Verbale with the State Department and an *amicus*

brief here does not transform Plaintiffs' state tort claims into federal questions. None of Plaintiffs' claims are based on federal law, and none require the resolution of federal issues. Furthermore, the issues of so-called national or international importance to the Federal Republic of Germany vanish under even the slightest scrutiny. All Ruhrgas has demonstrated is that the German government wants it to win. That fact, although undeniably true, hardly creates federal jurisdiction.

Finally, Norge was not fraudulently joined. It is undisputed that Norge owns legal title to the Production License for the Heimdal field. It also owns the unproduced gas in that block, and remains liable to its co-venturers and the Norwegian government for a host of liabilities set out in the terms of the License. Although MPCN is required to perform Norge's obligations under that License by virtue of a Pass Through Agreement, Ruhrgas is preventing MPCN from doing so. As a result, MPCN already has been forced to terminate its Gas Sales Agreement with Ruhrgas, and that termination will become effective in June of this year. Ruhrgas also is preventing MPCN from securing any other buyers for Heimdal gas, thereby ensuring that MPCN will default under the Pass Through Agreement. Thus, by the terms of the Pass Through Agreement, any rights and obligations previously assigned to MPCN will revert to Norge in four months. This is not merely a "possibility of reverter;" instead, Ruhrgas' actions have rendered reversion a certainty. In any event, Norge claims that Ruhrgas' actions have damaged the value of the Production License and the unproduced gas it unquestionably owns.

It also seeks to hold Ruhrgas liable for knowingly participating in Statoil's breach of fiduciary duty. Assuming Norge proves these allegations at trial, it obviously can recover damages for such claims. Thus, Norge was not "fraudulently joined" under any accepted definition, and complete diversity does not exist.

Factual Corrections and Disputes

Plaintiffs dispute a number of Ruhrgas' factual allegations, most of which bear little significance to the remand issue. For example, Ruhrgas contends that because a team of MOC employees negotiated the Gas Sales Agreement on behalf of MPCN, they necessarily divorced themselves entirely from any affiliation with MOC. According to Ruhrgas, any misrepresentations or omissions it made were made to MPCN, not MOC – even though the persons to whom they were speaking were MOC employees. The facts, however, demonstrate that Ruhrgas was well aware that it was dealing with MOC representatives, that Ruhrgas knew and expected that MOC would have to approve major expenditures, and that Ruhrgas knew MOC was providing the funds for MPCN's Heimdal operations.¹ Indeed, Ruhrgas itself acts as a lender to its own subsidiaries for projects conducted abroad.²

¹ These matters are discussed at length in Plaintiffs' Response to Ruhrgas' Motion to Dismiss for Lack of Personal Jurisdiction at pages 11-13. See also the Exhibits referred to in that discussion.

² Hoffmann Deposition at 188:9-13 (attached as Exhibit 1 to Plaintiffs' Response to Ruhrgas' Motion to Dismiss for Lack of Personal Jurisdiction).

Ruhrgas' representations about other actions MPCN is "prosecuting" in Europe also are inaccurate. MPCN has filed suit in Stavanger, Norway against the companies that own Statpipe, charging that Statpipe's pipeline tariff rates are working an unreasonable hardship on MPCN.³ The suit seeks a reduction in tariff rates. None of the relief being sought is duplicative in any respect to the relief being sought here. MPCN is the plaintiff in that action, Ruhrgas is *not* a defendant, and the causes of action relate solely to a transportation agreement to which MPCN is a party. In short, the Statpipe action is entirely distinct from the parties and claims in this case.

Ruhrgas' assertion that MPCN is prosecuting a claim before the European Commission is simply wrong; no such action has been filed.⁴ In any event, such an action would be criminal in nature, similar to lodging a complaint with the FTC in America. It could not seek civil damages for MPCN or any of the Plaintiffs.

Of course, none of these facts are relevant to the issues currently before the Court. Ruhrgas has simply inserted these allegations in an attempt to bolster its main complaint – that MPCN should be a plaintiff here and that this case should be sent to arbitration. But Ruhrgas ultimately must acknowledge a few simple truths:

³ A copy of the Statpipe suit is attached to Ruhrgas' Response as Exhibit 5.

⁴ The document attached as Exhibit 6 to Ruhrgas' Response is merely a draft complaint, as it expressly states at the top of the third page of the exhibit. It has not been filed.

- First, MPCN is *not* a plaintiff in this case. There is nothing untoward or improper about that fact; nothing requires MPCN to sue Ruhrgas.
- Second, MOC, MIOC and Norge have asserted their *own* claims in this case, *not* hypothetical claims that MPCN could have asserted if it had filed suit. In fact, all of the claims Plaintiffs are asserting would remain regardless of whether MPCN had ever existed. Each of the actual Plaintiffs is entitled to pursue its own claims, and each may select which claims it chooses to bring.
- Third, Ruhrgas has no arbitration agreement with MOC, MIOC or Norge – and the terms of its agreement with MPCN *exclude* those companies from the arbitration provision.

As will be further demonstrated below, many other “facts” are hotly contested between the parties, and all must be resolved in favor of remand.

ARGUMENT

I. The Burden of Sustaining Removal

Removal is a question of statutory construction, and, because removal jurisdiction is generally disfavored, statutes authorizing removal are strictly construed against removal. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941); *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 524 (5th Cir. 1994). The defendant has the burden to show that removal was proper and any doubts concerning the facts or the controlling law are resolved in favor of remand. *E.g.*, *Lackey v. Atlantic Richfield Company*, 990 F.2d 202, 206 (5th Cir. 1993). The basis for the removal is to be

stated with clarity in the Notice of Removal. Only technical amendments are permitted thereafter. *Wyant v. National R.R. Passenger Corp.*, 881 F. Supp. 919, 924-25 (S.D.N.Y. 1995); *Zaini v. Shell Oil Co.*, 853 F. Supp. 960, 964 & n.2 (S.D. Tex. 1994); *Castle v. Laurel Creek Co.*, 848 F. Supp. 62, 64-65 (S.D. W. Va. 1994).⁵

Ruhrgas goes to great lengths to suggest that Plaintiffs’ refusal to pursue other claims or to include other parties is “improper,” arguing that Plaintiffs’ claims are nothing more than artful pleading. The “artful pleading” rule, however, refers only to situations where the plaintiff’s sole claim is a federal one disguised as a state claim; and has no application where, as here, the plaintiff’s claims are grounded exclusively in state law. *See Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 366-67 (5th Cir. 1995) (further noting that the doctrine applies only in extraordinary circumstances). To be sure, Plaintiffs could have brought claims or pursued actions against parties that might have presented a proper case for removal. But they did not. The removal question is determined by reference to the claims the plaintiff *has actually* brought and by the parties that are actually – and properly – joined. *See Merrill Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986) (“jurisdiction may not be sustained on a theory that the plaintiff has not advocated”).

⁵ Were it otherwise, a removing defendant could simply remove, wait for the plaintiff to explain a fatal defect, then amend the Notice of Removal to add another ground to which the plaintiff would have to reply, and so on.

Plaintiffs' claims are what they are: common law claims arising under state law. Plaintiffs elected not to sue Statoil or the other Consortium members.⁶ Despite Ruhrgas' protestations, there is nothing "improper" about this. As the Fifth Circuit and the Supreme Court have stressed, a "Plaintiff is generally considered the master of his complaint, and 'whether a case arising . . . under a law of the United States is removable or not . . . is to be determined by the allegations of the complaint or petition and that if the case is not then removable it cannot be made removable by any statement in the [notice of] removal or in subsequent pleadings by the defendant.'" *Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 693 (5th Cir. 1995) (vacating trial and judgment) (quoting *Great N. Ry. v. Alexander*, 246 U.S. 276, 281-82 (1918)⁷). As master of its claims, a plaintiff may avoid federal jurisdiction by exclusive reliance on state law. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

Ruhrgas obviously would prefer for this case to remain on the crowded docket in the federal courts for the Southern District of Texas. But in removing this action, it chose to ignore the actual claims, the actual parties and the law governing removal. Plaintiffs' claims arise *only* under state law, and the parties are *not* diverse.

⁶ Notably, Ruhrgas has not seen fit to pursue any third-party actions against these parties either.

⁷ *Alexander* went on to hold that where an action is nonremovable on the complaint, it "cannot be converted into a removable one by evidence of the defendant or by order of the court upon any issue tried upon the merits." 246 U.S. at 281. The "power to determine the removability [sic] of his case continues with the plaintiff throughout the litigation." *Id.* at 282.

This may be a source of frustration to Ruhrgas' forum preference, but the reality is that "defendant's right to remove and the plaintiff's right to choose his forum are not on equal footing." *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994); see also *Merrill Dow*, 478 U.S. at 809 n.6.

This case was not removable when it was removed, and it has not become removable since. Ruhrgas was aware of the nature of Plaintiffs' claims and presumably was well-counseled with respect to the law governing removal. Accordingly, Ruhrgas should be ordered, pursuant to 28 U.S.C. § 1447(c), to pay Plaintiffs' just costs and actual expenses, including attorneys' fees incurred as a result of its improper removal.

II. None of the Grounds for Removal are Sound

A. Plaintiffs Never Have Consented to Arbitrate Their Claims, and MPCN's Consent Cannot Be Attributed to Them

Ruhrgas devotes 19 pages of its Response to regurgitating its prior briefing on the arbitration issue, but the fact remains that none of the Plaintiffs *ever* have agreed to arbitrate their claims. There is no legal basis for forcing Plaintiffs to surrender their rights and arbitrate their claims, and this Court has already – and correctly – rejected Ruhrgas' position on this issue. See Memorandum and Order denying motion to stay pending arbitration, signed November 15, 1995. Regrettably, however, Ruhrgas continues its Procrustean exercise to somehow

stretch an inapplicable arbitration clause to fit this litigation; but like Procrustes' guests, Ruhrgas' arguments don't fit the case at hand.

The United States and Texas Constitutions provide explicit guarantees of access to the courts for the resolution of disputes. U.S. Const., amend. I, XIV; Tex. Const. art. 1, § 13. Any waiver of this right of access must be both clear and deliberate. *E.g.*, *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1512 (3d Cir. 1994), *aff'd*, 115 S. Ct. 1920 (1995) (insisting on clear evidence of consent to arbitration); *Morewitz v. West of England Ship Owners Mut. Protec. & Indem. Ass'n*, 62 F.3d 1356, 1365 (11th Cir. 1995), *cert. denied*; No. 95-883, 1995 WL 730300, 64 U.S.L.W. 3428 (U. S. Feb. 20, 1996), ("we are reluctant to mandate arbitration where the claimants clearly did not bargain to do so"). In American courts, "*the law compels a party to submit to arbitration only if he has contracted to do so.*" *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991) (quoting *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 374 (1974) (emphasis added)).⁸

Ruhrgas itself has repeatedly stressed that there is no contractual commitment of any kind between itself and any of the Plaintiffs "concerning . . . any matters which

⁸ *Accord Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1216 (1995) ("arbitration is a matter of consent, not coercion"); *Volt Info. Servs., Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1989); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19-20 (1983); *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314 (5th Cir. 1994); *Britton v. Co-op Banking Group*, 4 F.3d 742, 744 (9th Cir. 1993); *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 334 (5th Cir.), *cert. denied*, 484 U.S. 943 (1987).

are the subject of the First Amended Petition." *E.g.*, Affidavit of Wolf-Dietrich W. Hoffman at ¶ 3 (attached to Defendant's Mem. in Supp. of Mot. to Dismiss Under Fed. R. 12(b)(2), (4) and (5)); Declaration of Lutz K. Eckert at ¶ 5 (attached to Notice of Removal). Thus, unlike the parties in *J.J. Ryan*,⁹ *Ripmaster*,¹⁰ or the other authorities Ruhrgas cites, none of the Plaintiffs has ever consented to arbitration. Ruhrgas' arbitration agreement with MPCN, which itself excludes application to MPCN's affiliates, cannot substitute for Plaintiffs' consent. *E.g.*, *Morewitz*, 62 F.3d at 1365; *Kaplan*, 19 F.3d at 1512.

1. The MPCN/Ruhrgas Contract Does Not Provide a Basis for Arbitration

The agreement between Plaintiffs' affiliate and Ruhrgas does not authorize arbitration of this case. Under long-settled U.S. law concerning contracts and corporations, that contract has no application to Plaintiffs. *E.g.*, *Mowbray v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 795 F.2d 1111, 1116 (1st Cir. 1986); *Coltrain v. F.N. Wolf & Co.*, 818 F.Supp. 163, 163-64 (E.D. Va. 1993); *Gemco Latinoamerica, Inc. v. Seiko Time Corp.*, 671 F.Supp. 972 (S.D.N.Y. 1987) (corporate parents not bound by arbitration clause between their wholly-owned subsidiary

⁹ *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988). Although Ruhrgas commenced this removal on the claim that arbitration could be compelled under U.S. authority, it has eschewed most of those cases and has now relegated the remaining authorities to page 25 of its Response.

¹⁰ *Ripmaster v. Toyoda Gosei, Co.*, 824 F. Supp. 116 (E.D. Mich. 1993).

and plaintiff); 1 FLETCHER ENCYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 43.85 (1990 Rev. ed.); 2 FEDERAL ARBITRATION LAW § 18.4 (1995).

That certain employees of Plaintiffs MOC and MIOC were seconded to their affiliate, MPCN, to participate in the negotiations of the contract and in subsequent disputes does not suggest that either MOC or MIOC are bound by the MPCN contract. Oddly enough, in connection with its personal jurisdiction motion, Ruhrgas repeatedly argues that these employees were acting *only* on behalf of MPCN. See Ruhrgas' Reply to Plaintiffs' Response to Ruhrgas' Motion to Dismiss for Lack of Personal Jurisdiction at 5.¹¹ In connection with the remand motion, however, Ruhrgas does an about face – arguing that MOC and MIOC's involvement was so great that the French "group of companies" doctrine should be invoked. Clearly, Ruhrgas can't have it both ways – but for purposes of this motion, neither of these premature merits-related positions is determinative.

At most, the limited facts adduced so far demonstrate, as Plaintiffs have alleged, that both MOC and MIOC were justifiably concerned about their sizable investment and were aware of MPCN's contract and its

¹¹ Of course, these individuals also remained MOC employees. Thus, any fraudulent omissions or misrepresentations made to them while representing MPCN necessarily were made to MPCN's lenders as well. Furthermore, they specifically kept MOC and MIOC abreast of all developments. See Bossley Deposition at 77:8-21 (Exhibit 2 to Ruhrgas Reply to Plaintiffs' Response to Ruhrgas' Motion to Dismiss for Lack of Personal Jurisdiction). Such merits contentions, however, have little relevance to the outstanding jurisdictional and remand issues.

terms. But awareness of an affiliate's contract, including a contract to arbitrate, is *not* a basis for compelling arbitration. *Thompson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995); *Kaplan*, 19 F.3d at 1513; *CBS, Inc. v. Snyder*, 798 F. Supp. 1019, 1025 (S.D.N.Y. 1992), *aff'd*, 989 F.2d 89 (2d Cir. 1993). Thus, for example, the Third Circuit recently held that the owners of a corporation could not be compelled to arbitrate their claims where they had signed agreements concerning the subject matter but only the corporation had signed the agreement actually containing the arbitration clause. *Kaplan*, 19 F.3d at 1513. Noting the paramount importance of consent, the court stressed that evidence of individual agreement to arbitrate must be "express" and "unequivocal." *Id.* at 1512.

Ruhrgas has not shown any evidence to suggest that Plaintiffs themselves expressly and unequivocally consented to arbitration in connection with the MPCN contract. Critically, the MPCN/Ruhrgas contract *omits* affiliates from the arbitration provision, despite defining them and referring to them elsewhere.¹² Under

¹² This is the most obvious reason why Plaintiffs cannot be bound by the arbitration provision of the Ruhrgas/MPCN contract, yet Ruhrgas has failed to address the issue in any of its seven arbitration-related briefs. The Agreement expressly defines the term "Affiliates," but the contract's arbitration provision (Article 15) excludes *any reference* to such Affiliates being required to arbitrate disputes. Ruhrgas certainly knows how to draft a contractual provision that binds a company's affiliates. For example, its Noncompetition Agreement with Tenneco Energy Resources Corporation provides "Ruhrgas shall not, *directly or indirectly through Affiliates or otherwise*, engage in the purchase and sale of natural gas . . . other than through

universally accepted rules of contract construction, it must be presumed that this exclusion of affiliates was deliberate. *United States v. Lamere*, 980 F.2d 506, 513 (8th Cir. 1992); 17A C.J.S. *Contracts* § 312 (1963); see also *Mowbray*, 795 F.2d at 1116 (finding arbitration provision inapplicable where parties to contract were aware of third-party but excluded it from arbitration clause); *Otto Wolff Handelsgesellschaft mbH v. Sheridan Trans. Co.*, 800 F. Supp. 1353, 1357 (E.D. Va. 1992) (same); *Tays v. Covenant Life Ins. Co.*, 964 F.2d 501, 503 (5th Cir. 1992) (interpreting NASD arbitration rules); *Tropical Cruise Lines, S.A. v. Vesta Ins. Co.*, 805 F. Supp. 409, 412 (S.D. Miss. 1992) ("A court cannot twist the language contained in the contract to achieve a result which is favored by [general] federal policy [such as arbitration] but contrary to the intent of the parties). There is no basis stated in the Notice of Removal or supported by evidence that Plaintiffs assumed a contractual obligation to arbitrate anything.

2. Ruhrgas Has Not Pleaded or Proven Any Exception To The Consent Requirement Cognizable Under U.S. Law

Only in certain well-defined instances may a corporation be compelled to arbitrate because its corporate affiliate has an arbitration agreement. See *Thompson*, 64 F.3d at 778. But Ruhrgas has not pleaded, much less proven, any of these grounds in support of its conclusions. Nor has it

TERC and its subsidiaries." Exhibit 15 to Plaintiff's Response to Motion to Dismiss for Lack of Personal Jurisdiction (emphasis added). No similar language appears in its Gas Sales Agreement with MPCN.

sought to explain how any such exception could apply where the contract it invokes deliberately excludes the position it now asserts.

Instead, Ruhrgas clings to the "virtual representation" dicta in a footnote to *In re Talbott Big Foot, Inc.*, 887 F.2d 611, 614 n.4 (5th Cir. 1989). Ruhrgas continues to disregard the actual holding in that decision, which refused to compel arbitration because the court was "unaware of any federal policy that favors arbitration for parties who have not contractually bound themselves to arbitrate their disputes." *Id.* at 614. While the Fifth Circuit has yet to revisit the footnote, *Big Foot's* actual holding has been consistently applied in the Fifth Circuit and elsewhere. E.g., *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990) (citing *Big Foot* for rule that "a party cannot be compelled to submit a dispute to arbitration unless there has been a contractual agreement to do so"); *Tropical Cruise Lines*, 805 F. Supp. at 412.

Putting aside the actual holding, even the *obiter dictum* of the *Big Foot* footnote, on which Ruhrgas places exclusive reliance, does not suggest that "virtual representation" is a basis for compelling arbitration. The court clearly confined its "virtual representation" discussion to the question of whether a court might stay an unarbitrable action until a parallel arbitration was completed. Thus, the question posed in the footnote is *not* whether an arbitration commitment could be created, but rather, whether a case could be stayed for a short time pending the outcome of an existing arbitration elsewhere that might give rise to *res judicata* considerations. See *Big Foot*, 887 F.2d at 614; *Hornbeck Offshore (1984) Corp. v. Coastal Carriers Corp.*, 981 F.2d 752, 755 (5th Cir. 1993) (discussing

this aspect of *Big Foot*); *NCR Credit Corp. v. Reptron Elecs., Inc.*, 863 F. Supp. 1561, 1566 (M.D. Fla. 1994) (same); *Tropical Cruise Lines*, 805 F. Supp. at 413 (same). Critically, the Fifth Circuit never suggested in the footnote, as Ruhrgas would now have this Court hold, that the party to the litigation could be required to arbitrate. See, e.g., *Hornbeck*, 981 F.2d at 755; *NCR Credit Corp.*, 863 F. Supp. at 1566.

Ruhrgas then follows with another inapposite case, *Astron Industrial Assoc., Inc. v. Chrysler Motors Corp.*, 405 F.2d 958, 961 (5th Cir. 1968), which did not involve either arbitration or removal. Nonetheless, because the court in that case found collateral estoppel to arise in connection with corporate affiliates, Ruhrgas claims that its dispute is arbitrable under the *Big Foot* footnote. Unlike this case, however, *Astron* was concerned with a scenario that could call for *res judicata* or collateral estoppel: a final judicial decision on the merits involving identical claims. E.g., *Commissioner v. Sunnen*, 333 U.S. 591 (1948) ("issues must be identical in all respects"). There is no existing litigation between MPCN and Ruhrgas – let alone one that is final or one that has resolved the same issues – that could provide such a basis here.¹³ Moreover, in *Astron*, unlike

¹³ Ruhrgas would have the Court extend the virtual representation doctrine to hold that Plaintiffs are "virtual" parties to the MPCN contract. There is no basis in existing law for one to be "virtually represented" in a contract. By definition, the virtual representation doctrine applies only to prior or concurrent legal proceedings. Only litigation has *res judicata* and collateral estoppel implications – contracts do not. To assert that the doctrine of virtual representation applies to contracts is erroneous, and Ruhrgas has cited no authority supporting such a proposition.

here, there was a substantiated claim of alter ego to support the identity of issues element of collateral estoppel. E.g., *Hart v. Yamaha-Parts Distrib., Inc.*, 787 F.2d 1468, 1472-73 (11th Cir. 1986) (explaining *Astron*). No such allegation has been made in this case.¹⁴

3. Arbitrability Is Not Governed By International Principles As Allegedly Discovered in France

Neither the Convention upon which Ruhrgas so heavily relies, nor the statute implementing it (9 U.S.C.

¹⁴ While alter ego, unlike virtual representation, can be a valid basis for requiring a corporation to arbitrate, it has no potential application here. *Thompson*, 64 F.3d at 776. Ruhrgas has not alleged, much less proven, that Pan Ocean Energy Company, MPCN's parent, so dominates or controls its affiliate that MPCN's corporate existence should be disregarded. It has not alleged that MIOC so dominates Pan Ocean, or that MOC so dominates MIOC. Nor could it. It is far too late to add any such claim or to go off in search of evidence in support of it. *Wyant v. National R.R. Passenger Corp.*, 881 F. Supp. 919, 924-25 (S.D.N.Y. 1995); *Zaini v. Shell Oil Co.*, 853 F. Supp. 960, 964 & n.2 (S.D. Tex. 1994); *Castle v. Laurel Creek Co., Inc.*, 848 F. Supp. 62, 64-65 (S.D. W. Va. 1994). Furthermore, any such claim likely would be governed by the law of Delaware (the state of incorporation) and would be bound to fail. *Kalb, Voorhis & Co. v. American Fin. Corp.*, 8 F.3d 130, 132 (2d Cir. 1993); *Jefferson Pilot Broad Co. v. Hilary & Hogan, Inc.*, 617 F.2d 133, 135 (5th Cir. 1980); RESTATEMENT (SECOND) OF CONFLICTS § 307. Mere fact of affiliation, including 100% stock ownership, is insufficient to pierce the corporate veil. *Scott-Douglas Corp. v. Greyhound Corp.*, 304 A.2d 309, 314 (Del. Super. Ct. 1973). Rather, some fraud or serious injustice also must be shown. *Terry Apartment Assoc. v. Associated-East Mortg. Co.*, 373 A.2d 585, 588 (Del. Ch. 1977). It is not sufficient to argue, as Ruhrgas does, that it would simply be more convenient to have arbitration.

§ 205), authorizes a general abdication of U.S. law. Indeed, far from abandoning the constitutional right of access, the statute and Convention require that the arbitration agreement be committed to writing and signed. See Convention at art. II, 3 U.S.T. 2517.

The Convention does not suggest that its writing or signature requirements can be dispensed with in favor of the "group of companies doctrine" – a doctrine whose beginning and ends are far from self-evident. Thus, even assuming that the prevailing view among the Parisian bench and bar is that arbitration can be compelled whenever the litigant is affiliated with a corporation that has an arbitration contract, that rule has no application in this country.¹⁵ Instead, the scope of the congressional commitment to international arbitration policies is spelled out in the Convention and its implementing statute, which track the Federal Arbitration Act. Under federal law, consent to arbitration is resolved as a matter of U.S. contract law. *First Options of Chicago v. Kaplan*, 115 S. Ct. 1920, 1925 (1995); *Morewitz*, 62 F.3d at 1364.

This Court already has ruled that the arbitration provision of Ruhrgas' Gas Sales Agreement with MPCN does not apply to Plaintiffs, a ruling consistent with controlling U.S. authority. There is no reason in law or fact for the Court to reconsider. Accordingly, the Court should

¹⁵ Plaintiffs don't "attempt to distinguish" *Dow Chemical v. Isover Saint Gobain*, Cour d'Appel, Paris, 21 October 1983, 110 D. S. Jur. 899 (1983) IX Yearbook, 132 (1984), because that decision states a rule of French law that is wholly irrelevant to this case. That case, however, does not support Ruhrgas' position, because the parties there apparently *did* agree to arbitration.

deny Ruhrgas' Motion to Reconsider, and in the process, eliminate Ruhrgas' principal basis for its removal of this case to federal court.

B. Norge Was Not Fraudulently Joined

The burden on a removing party seeking to prove fraudulent joinder is "a very heavy one,"¹⁶ and must be established "by clear and convincing evidence."¹⁷ All disputed questions of fact and all ambiguities in state law must be resolved in favor of the non-removing party.¹⁸ The removing party must show actual fraud in connection with the jurisdictional averments, or that the plaintiff has "absolutely no possibility of recovery." *Green v. Amerada Hess Corp.*, 707 F.2d 201, 205 (5th Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984). Ruhrgas does not allege any actual fraud; its fraudulent joinder argument is premised solely on the contention that Norge cannot possibly recover in this case.

1. Fraudulent Joinder is Not a Substitute For Summary Judgment

In its Response, Ruhrgas contends that there is insufficient evidence for Norge to prevail on claims of tortious interference and for Ruhrgas' participation in the breach

¹⁶ E.g., *Ford v. Elsbury*, 32 F.3d 931, 935 (5th Cir. 1995).

¹⁷ *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir.) *cert. denied*, 498 U.S. 817 (1990).

¹⁸ *Dollar v. General Motors Corp.*, 814 F. Supp. 538, 541 (E.D. Tex. 1993) (citing *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992)).

of fiduciary duties owed to Norge by its partner, Statoil. These challenges are not only unfounded in fact, they are out of place in the fraudulent joinder context. As the Fifth Circuit has repeatedly warned, trial courts should avoid pre-trying the merits of the case in response to cries of fraudulent joinder. *E.g.*, *Ford v. Elsbury*, 32 F.3d 931, 935 (5th Cir. 1994). While the Court may consider summary judgment-type evidence, this is *not* a summary judgment motion.¹⁹ The only question at issue is whether there is any "possibility" that the plaintiff could recover.²⁰

The alleged fraudulent joinder here is of a *plaintiff*, the merits of whose claims Ruhrgas should have attacked in state court by summary judgment. *See Louisiana v. Sprint Communications Co.*, 892 F. Supp. 145, 148 (M.D. La. 1995); *WMW Mach. Co. v. Koerber A.G.*, 879 F. Supp. 16, 17 (S.D.N.Y. 1995). In this unusual context, the only question becomes whether the plaintiff is a real party in interest. *E.g.*, *Iowa Public Serv. Co. v. Medicine Bow Coal Co.*, 556 F.2d 400, 404 (8th Cir. 1977).

¹⁹ Indeed, Plaintiffs have not been permitted to take even limited discovery regarding Ruhrgas' dealings with Statoil, despite the fact that one of the claims Ruhrgas now urges the Court to dismiss concerns Ruhrgas' participation in Statoil's breach of fiduciary duty. Summary judgment practice, of course, would afford Plaintiffs such discovery.

²⁰ *E.g.* *Ford*, 32 F.3d at 938; *Green*, 707 F.2d at 205; *B, Inc. v. Miller Brewing Co.*, 663 F.2d 545, 459-50 (5th Cir. 1981); *Horton v. Scripto-Tokai Corp.*, 878 F. Supp. 902, 906 (S.D. Miss. 1995).

2. Norge is a Real Party in Interest By Virtue of Its Claim for Participation in Breach of Fiduciary Duty

That Norge is a real party in interest is readily demonstrated in connection with its claim for Ruhrgas' participation in breach of fiduciary duty. It is undisputed that Norge is a joint venturer and partner with Statoil. *See* Petition at ¶50, 17, 19. Among other things, Plaintiffs allege that Statoil breached fiduciary duties owed to Norge as a partner in the Heimdal development, that Ruhrgas knew of these breaches, and that Ruhrgas participated in those breaches. *See* Petition at ¶52-55. Ruhrgas' response is: "so what?"; explaining that it "has been unable to find any authority suggesting that Texas recognizes a cause of action for participation in a breach of fiduciary duty by another." Ruhrgas' Response at 41.

Perhaps Ruhrgas should have looked more carefully. Texas law is replete with examples of cases recognizing a cause of action for participation in breach of fiduciary duty. For instance, the Texas Supreme Court's holding on the issue is unequivocal:

It is the settled law of this state that where a third party knowingly participates in the breach of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such.

Kinzbach Tool Co. v. Corbett-Wallace Corp., 138 Tex. 565, 160 S.W.2d 509, 514 (1942). Numerous other cases have recognized this established rule.²¹

²¹ *See City of Fort Worth v. Pippen*, 439 S.W.2d 660, 665 (Tex. 1969) (title company held liable for knowing participation in

Under the Pass Through Agreements, Norge *remains liable* to its co-venturers for *all* obligations under the License and the Operating Agreement.²² Likewise, nothing in those agreements relieves Norge's co-venturers (including Statoil) of their obligations to Norge. Indeed, Norge's co-venturers continued (and still continue) to recognize it as a partner long after the Pass Through Agreement's execution. *See* Amendment 3 to the Joint Operating Agreement, which is signed by ~~all~~ Heimdal partners and explicitly refers to Norge's interest in the field (contained in Exhibit 1, attached hereto). Accordingly, Norge certainly has the "possibility" of recovering against Ruhrgas for participation in Statoil's breach of

city land agent's breach of fiduciary duty); *Kirby v. Cruce*, 688 S.W.2d 161, 166 (Tex. App. - Dallas 1985, writ ref'd n.r.e) (participants in the breach of a fiduciary's duty are jointly and severally liable, even if they do not personally receive the benefit of the breach); *Chien v. Chen*, 759 S.W.2d 484, 487 n.2 (Tex. App. - Austin 1988, no writ) (if one breaches a fiduciary duty and another knowingly participates, both may be held jointly and severally liable); *Lone Star Partners v. NationsBank Corp.*, 893 S.W.2d 593, 601 (Tex. App. - Texarkana 1994, writ denied) (same); *Herider Farms-El Paso, Inc. v. Criswell*, 519 S.W.2d 473, 477 (Tex. Civ. App. - El Paso 1975, writ ref'd n.r.e) (same).

²² *See* Pass Through Agreements, copies of which are attached to the Declaration of Finn Engzelius as Exhibits A and B. The Declaration is attached as Exhibit 1 to the Motion to Remand. *See also* Engzelius at 112:22-113:7 (attached as Exhibit 3 to Ruhrgas' response).

fiduciary duty.²³ This fact alone proves that Norge was not fraudulently joined as a Plaintiff.

3. Norge is a Real Party in Interest Because It Holds Title to the Production License and Heimdal Gas

It is undisputed that Norge alone holds legal title to the Heimdal Production License and to the unproduced gas in the Heimdal field. Declaration of Finn Engzelius at ¶ 5 (attached as Exhibit 1 to Motion to Remand); *see also* Exhibit 1 hereto. It has alleged, and the evidence adduced so far confirms, that Ruhrgas and the Consortium are preventing MPCN from securing new purchasers for produced Heimdal gas, thereby preventing MPCN from performing its obligations to Norge under the Pass Through Agreements.²⁴ Norge claims that this tortious interference, along with Ruhrgas' other actions, have damaged the value of its license and the unproduced gas in the Heimdal field. Furthermore, due to Ruhrgas' actions, MPCN has terminated its existing Gas Sales Agreement with the Consortium, effective June, 1996. *See* Exhibit 2 hereto (MPCN's notification of termination). Because Ruhrgas continues to deny other buyers access to

²³ Mr. Engzelius, Norge's Managing Director, testified that to the extent the past actions of Ruhrgas and its co-conspirators had affected the market value of North Sea gas, it would have a significant impact on the value of Norge's interest. Engzelius at 115:10-17.

²⁴ *See* Hoffmann Deposition at 275-79 (acknowledging Ruhrgas' refusal to permit non-Consortium members to access Heimdal gas), *i.e.* Engzelius at 116:20-117:4 (noting Ruhrgas had "blankly denied" any third party access to Heimdal gas).

MPCN's produced gas, Norge will have no buyers for its gas when MPCN ceases operations.²⁵ Thus, unless Ruhrgas undergoes a sudden change of heart, Norge will have additional tortious interference claims in four months. Furthermore, MPCN's demise will significantly increase Norge's exposure to liability to its partners and the Norwegian government. See Engzelius at 113:8; 114:1; 119-21.

Ruhrgas argues that Norge technically is the holder of a "possibility of reverter," and that under Texas law, such an interest is insufficient. Ruhrgas has completely failed, however, to consider whose law controls the nature of Norge's interest, and has misanalyzed the nature of the interest Norge conveyed to MPCN when those parties executed the Pass Through Agreement.

a. Whose Law Governs

In determining whose law governs the narrow question of ownership of the Heimdal field, this Court applies Texas choice of law rules, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), which traditionally have been

²⁵ Ruhrgas argues that it is not *certain* that MPCN will be unable to locate another buyer and, thus, that there is a possibility that the default will not occur. This argument reverses the burden and would require the nonremoving party to establish its claim not by a possibility but by a certainty. E.g., *Horton v. Scripto-Tokai Corp.*, 878 F. Supp. 902, 907 (S.D. Miss. 1995). In view of the fact that Ruhrgas and the Consortium control all of the gas lines leaving Emden and have refused to provide access to non-Consortium buyers, it is not only "possible" that MPCN will not find a buyer in the next four months, it is virtually certain.

simple in this context: The title to real property is determined by the law of the situs of the property. See *Estabrook v. Wise*, 506 S.W.2d 248, 249 (Tex. Civ. App. - Tyler), *vacated as moot*, 519 S.W.2d 632 (Tex. 1974); RESTATEMENT (SECOND) OF CONFLICTS, § 223; see also *Delta Energy Resources, Inc. v. Damson Oil Corp.*, 72 B.R. 7 (W.D. La. 1985). The property at issue lies off the Norwegian continental shelf and, thus, questions about who owns it likely will be resolved under Norwegian law.

Mr. Engzelius, who also is a Norwegian attorney, testified at length about these issues, and explained that Norwegian law *requires* that a Norwegian company hold title to Norwegian oil and gas fields at all times in order to ensure that a domestic company can be called upon to respond to any obligations.²⁶ Engzelius at 51; Exhibit 24 to Engzelius at §§ 11 & 15 (license holder should be Norwegian registered company and license conveys exclusive right to exploration and exploitation) (attached as Exhibit 3 hereto). All North Sea Pass Through Agreements are subject to the approval of the Norwegian government in order to ensure that a Norwegian company, in this case Norge, retains title to the License for the field. *Id.*; Engzelius at 15-16; 29-31, 36-37, 42, 44. See also Pass Through Agreements²⁷ (indicating revocable governmental approval).

²⁶ Ruhrgas' assertion that Norge's statutory accounts fail to reflect its interest in the Heimdal field is inaccurate. See Engzelius at 112:4-21.

²⁷ Exhibits A and B to Declaration of Finn Engzelius (Exhibit 1 to Motion to Remand).

As a matter of Norwegian law, Norge held title to the Heimdal gas before and after the Pass Through Agreement's execution, and continues to hold it today. Engzelius Deposition at 42, 44. Accordingly, Norge is a real party in interest to any action complaining of a decrease in the value of its Production License or the unproduced gas remaining in the Heimdal field.

b. The Nature of Norge's Property Interest

Even if Norge's interest were determined by Texas law,²⁸ Ruhrgas' argument that Norge has only a "possibility of reverter" would fail. Ruhrgas' argument relies on excerpts of Mr. Engzelius testimony in which he candidly acknowledges that the "reversion" of MPCN's beneficial interest back to Norge is not "certain" to occur at a fixed point in time. Thus, Mr. Engzelius conceded that if Ruhrgas never had interfered, he would not be able to determine when such a reversion would occur. But Ruhrgas' argument ignores the wording of the Pass Through Agreements and the facts and circumstances surrounding those agreements.

i. MPCN Received Rights Only to Produced Gas

Norge did not transfer title to its Production License or to the unproduced Heimdal gas to MPCN. Instead, it

²⁸ Although Texas law will apply to Norge's tortious interference claim, it likely will not define the nature of Norge's property interest.

executed a contract permitting the gas actually gathered and produced to be sold by MPCN. Hence, as its name implies, the Pass Through Agreements allowed the income from the field to be realized by another company for taxation purpose. Engzelius at 51. The language of the Pass Through Agreement does not grant MPCN any interest in unproduced minerals in place. Far from it, the language merely grants MPCN rights in the gas that is "produced and accumulated" and makes no mention of the gas remaining in the ground. Under Texas common law, this would not convey any estate in the land (freehold or otherwise).²⁹

ii. If Any Estate Passed to MPCN, It Was A Tenancy

Even assuming that the Pass Through could be construed to convey some possessory rights in the minerals in place, which it clearly does not, the next question would be whether that interest was a freehold or a non-freehold. A freehold estate is created when the grantee receives legal title in the property and is thus "seised" of the land. *E.g., Matter of Estate of Stroh*, 392 N.W.2d 192, 195 (Mich. Ct. App. 1986); Cornelius J. Moynihan, INTRODUCTION TO THE LAW OF PROPERTY 87-90, 163-167 (1962). Nothing in the Agreement suggests that MPCN received

²⁹ *Canter v. Lindsey*, 575 S.W.2d 331, 335 (Tex. Civ. App. - El Paso 1978, writ ref'd n.r.e.); *Barker v. Levy*, 507 S.W.2d 613, 616-20 (Tex. Civ. App. - Houston [14th Dist.] 1974, writ ref'd n.r.e.); see also *Rhodes v. United States*, 464 F.2d 1307, 1310 (5th Cir. 1972); *Pease v. Dolezal*, 246 P.2d 757, 760 (Okla. 1952); WILLIAM E. BURBY, REAL PROPERTY § 45 (1965).

a fee to the minerals in place. Indeed, the key legal incident of "fee ownership" – the right of alienation – is completely absent. *Forderhouse v. Cherokee Water Co.*, 623 S.W.2d 435, 438 (Tex. Civ. App. – Texarkana 1981), *rev'd on other grounds*, 641 S.W.2d 522 (Tex. 1982); *see also Martynes & Assoc. v. Devonshire Square Apts.*, 680 P.2d 246, 249 (Colo. Ct. App. 1984); *State Realty Co. v. Wood*, 57 S.E.2d 102, 104 (Va. 1950). Likewise, the documents on this issue confirm that Norge retained legal title to the minerals. *See* Exhibit 29 to Engzelius Deposition, attached hereto as Exhibit 4. *See also* the authorities cited *supra* at n.27; Williams & Meyers, *MANUAL ON OIL AND GAS LAW*, 503-04 (1987) (describing similar nonfreehold estates in the oil and gas context).

Under Texas property law, MPCN's "possession," not accompanied by "seisin," could not be a nonfreehold estate. Thus, the relationship between Norge and MPCN would be governed by the rules applicable to landlord and tenant. In particular, the estate would be for so long as the field is economically productive or until a default occurs: a periodic tenancy subject to a condition subsequent. *See Philpot v. Fields*, 633 S.W.2d 546, 548 (Tex. App. – Texarkana 1982, no writ); *RESTATEMENT (SECOND) OF PROPERTY* § 1.7 cmt. e (1977). Instead of a "possibility of reverter," Norge retained title throughout and also would have held a reversion of MPCN's nonfreehold estate when (1) the field became uneconomic under then-existing technological conditions or (2) MPCN came into default.

Assuming a tenancy, Norge has a clear, present right to damages

Regardless of whether reversion is triggered, Norge, under Texas notions of landlord tenant law, would have a present right to sue for damage to the freehold (*i.e.*, the value of the field itself) and to its reversion. *Speedman Oil Co. v. Duval County Ranch Co., Inc.*, 504 S.W.2d 923, 927 (Tex. Civ. App. – San Antonio 1973, writ *ref'd n.r.e.*); 51 C.J.S. *Landlord and Tenant* § 260 (1963) ("The action of the landlord for injury to the reversion will lie notwithstanding the tenant at the same time brings an action, founded on the same cause, for injury to his possession."). Norge's claims relate to Ruhrgas' interference with MPCN's obligations to Norge under the Pass Through Agreement, Norge's inability to obtain prospective access to buyers for the Heimdal gas, as well as to the diminution in value to Norge's Production License. All of these claims are presently cognizable, notwithstanding MPCN's current contract right to sell gas that has actually been gathered.³⁰ *E.g.*, *Speedman Oil Co.*, 504 S.W.2d at 927.

Actual Reversion is Imminent

Regardless of Norge's present status as the fee holder under the License, it also is undisputed that MPCN is near default or termination. It has already notified the buyers, including Ruhrgas, that it will not sell gas after June of this year. *See* Exhibit 2 hereto (notification and

³⁰ Mr. Engzelius testified that accessibility and likelihood of getting Heimdal gas to the market affects the value of Norge's interest. Engzelius at 92:12-23, 93:19-94:19.

consortium response). Likewise, MPCN has also notified the other participants in the Heimdal field that it considers the project to no longer be economic within the meaning of the applicable agreements. See Exhibit 6 hereto.

Ruhrgas, as it pointed out in its Response, disputes MPCN's right to terminate future sales. When approached repeatedly about permitting other buyers to access Heimdal gas, Ruhrgas found MPCN's requests to "lack actual relevance", noted that allowing access is not "part of its business", or has simply refused to respond. See Exhibit 7 hereto. There are only two possible resolutions of MPCN's current quandary. If MPCN is incorrect (and it does not have the right to terminate), then MPCN is in default within the meaning of the first paragraph of the Pass Through Agreement. In this case, Norge will terminate the Pass Through Agreement as provided in paragraph nine. If, on the other hand, MPCN is correct, then production and collection of gas will end, and with it, MPCN's rights under the Pass Through. In either event, only Norge would have the right to complain of the impact of Ruhrgas' tortious interference on the remaining gas and the Production License.

4. Norge is a Real Party In Interest Even Under Ruhrgas' Theory

Citing the RESTATEMENT (FIRST) OF PROPERTY § 214, Ruhrgas acknowledges, albeit implicitly, that the holder of a reversionary interest has standing to pursue an action against third-parties for damage to the value of the property. However, citing comment b to this section,

which refers to § 154, Ruhrgas then simply proclaims that Norge's interest is a "possibility of reverter"³¹ because the date of the reversion is uncertain.³²

Ruhrgas is correct that the date of this event is uncertain. But, as section 154 makes clear, certainty is not required. RESTATEMENT (FIRST) OF PROPERTY § 154, comment e. There, in describing an indefeasible fee sufficient to give standing to pursue an action for damages, the Restatement refers to illustration 1, an instance in which "A, having a valuable painting, transfers the painting to B for life." A has a cognizable interest notwithstanding the fact that B's life was not certain to end on a particular date.

While it was not clear at the time the Pass Through Agreement was executed that MPCN would default, it was clear that production from the field would eventually

³¹ Ruhrgas does not point to the caveat appearing at the bottom of that section, which warns: "The Institute takes no position as to whether, in situations not involving the landlord-tenant relationship, the owner of a future interest can recover damages from a third-person in cases other than those described in this section."

³² Ruhrgas claims that Mr. Engzelius testified that a reversion might never occur. Ruhrgas Resp. at 35. This is a mischaracterization of the testimony. The questions to Mr. Engzelius focused on whether he knew for a certainty that reversion would occur as a result of MPCN's inability to find an alternate buyer before June of this year. Mr. Engzelius also explained that the lack of reversion would depend on the continued profitable operation of the field. E.g., Engzelius at 87, 52. Once the field was depleted, the rights under the Pass Through would be completed and come to a natural end. E.g., *id.* at 52.

decline to the point that it became uneconomic under current technological conditions to continue production. At that point, the gas well would be shut in or abandoned and the Pass Through would terminate by virtue of its own completion. Some gas would remain, however, and Norge would retain the right to any production that could be accomplished in the future once technology improves.

Ironically, even if Ruhrgas had been correct in its hypothesis that Norge's interest was a "possibility of reverter," it would have made no difference. Ruhrgas' actions have assured that MPCN will default under the Pass Through Agreement because it no longer will be able to sell its gas to anyone after June, 1996. Accordingly, Ruhrgas has rendered termination of the Pass Through Agreement a necessity, making the "possibility" of reverter a "certainty." Besides, even a "possibility" of reverter indicates there is a "possibility" of recovery, which is all that is required to defeat a fraudulent joinder assertion.

C. The Claims Asserted in the Petition Do Not Arise Under Federal Law

Finally, Ruhrgas claims that federal question jurisdiction also exists because the Plaintiffs' claims involve international issues. In support of this, Ruhrgas originally invoked the Act of State doctrine. See Notice of Removal at ¶ 7. In apparent recognition of the failings of this theory,³³ Ruhrgas now claims that the Note Verbale and

³³ In the first place, no party to this action is a foreign sovereign. In addition, the Act of State doctrine is simply not

the amicus brief of the Federal Republic of Germany filed on its behalf have imbued the Plaintiffs' claims with an international aura.³⁴ See Ruhrgas Response at 43-50. This, claims Ruhrgas, is sufficient to convert claims of common law tort into "federal questions" under 28 U.S.C. § 1331.

This argument ignores the analysis required for federal question removal jurisdiction. First, the issue is whether Plaintiffs' claims arise under federal or state law. That Ruhrgas has managed to wield sufficient influence within the German government to obtain arguments on essentially every pending issue does not change the character of Plaintiffs' claims. Statements by the defendant in its removal or subsequent pleadings do not create a

applicable to "acts committed by foreign sovereigns in the course of their purely commercial activities." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 683, 706 (1976); *Arango, v. Guzman Travel Agency Travel Advisors Corp.*, 621 F.2d 1371, 1380-81 (5th Cir. 1980); *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 396 (D.N.J. 1979). Thus, even assuming that Statoil were made a party and that it sought to invoke this defense, it would likely have a difficult task in explaining how the marketing of gas to foreign markets is anything but a commercial activity. Moreover, the act-of-state analysis presupposes that the case already is properly in federal court. But, of course, that is not the case here.

³⁴ The mere fact that Ruhrgas has managed to secure a brief and Note Verbale stating that Ruhrgas, rather than the Plaintiffs, should win all of the outstanding motions and purporting to substantiate the national interest in favor of Ruhrgas' positions merely attests to Ruhrgas' substantial influence within the German government. During discovery, Ruhrgas admitted that its representatives had met with the German government to discuss the case. See Benke Deposition at 79-80 (Exhibit 12 to Plaintiffs' Response to Ruhrgas' Motion to Dismiss for Lack of Personal Jurisdiction).

ground for removal under federal law. See *Avitts*, 53 F.3d at 693. The statements of essentially an "oath helper," even a sovereign one, are of no assistance to the Court's analysis.

This Court and the Fifth Circuit both have held that claimed assertions of international issues are "foreclosed by the familiar well-pleaded complaint rule." *Aquafaith Shipping, Ltd. v. Jarillas*, 963 F.2d 806, 808 (5th Cir.), cert. denied, 506 U.S. 955 (1992); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1348-49 (S.D. Tex. 1995). Here, the Petition states no such issues.

Second, even assuming the presence of an "international issue", it would not convert Plaintiffs' claims into federal questions arising under federal common law. The federal common law is severely restricted and does not reach to every case involving national or foreign interests, as Ruhrgas' argument implies. The recognition of federal law is normally left to Congress and always results in the displacement of state law. Accordingly, as the Supreme Court has warned, "the instances where we have created federal common law are few and rare." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). The Fifth Circuit has been no more receptive. The court, sitting *en banc*, has refused to usurp state law unless the asserted "interest . . . relate[s] to an articulated congressional policy or directly implicate[s] the authority and duties of the United States as a sovereign." *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1325 (5th Cir. 1985) (*en banc*). None of Plaintiffs' claims in this case arise out of an articulated congressional policy, nor do they implicate the authority of the United States as a sovereign. Instead, they merely state garden-variety fraud and tort claims.

Third, even if the "intervention" of the German government had some relevance, the claims in this case do not have any colorable impact on Germany and thus cannot implicate laws of foreign relations or thereby create an international issue. Only where dispositive issues in the case would require application of federal common law will the federal question statute be invoked. *First Haw. Bank v. Alexander*, 558 F. Supp. 1128, 1131 (D. Haw. 1983). The claims here arise in tort. None of the Plaintiffs seek injunctive relief or any form of order that would interfere with the title to property in a foreign state.³⁵ The only conceivable impact this case would have on a foreign nation would be to require one of its citizens to pay a judgment. If this were enough to create a federal question, every action involving a foreign defendant would be removable, and state courts would have no authority over any such claim.

The German filings themselves demonstrate that this case does not involve questions of foreign relations. Far from confirming that Plaintiffs' claims arise under federal law or that the claims would affect some sovereign interest of Germany, the filings merely repeat all of Ruhrgas'

³⁵ Furthermore, given the infinitesimal impact of Heimdal gas on Germany's total gas purchases, this case could not possibly have any impact on the price of gas in Germany as the German government implies. Dr. Hoffmann, the head of Ruhrgas' North Sea gas purchases, testified that such gas only accounts for 0.5% of Ruhrgas' gas purchases. Hoffmann Deposition at 69-70 (Exhibit I to Plaintiffs' Response to Ruhrgas' Motion to Dismiss for Lack of Personal Jurisdiction). In any event, Plaintiffs are not seeking any adjustment to the purchase price for gas in the North Sea as a remedy for the claims asserted in this case.

arguments. The timing of the German filings suggests they were prepared at Ruhrgas' insistence so that it now could cry "international issue."³⁶

None of the cases Ruhrgas cites support its claim that this case presents "international issues." In *Kern v. Jepsen Sanderson, Inc.*, 867 F.Supp. 525 (S.D. Tex. 1994), the plaintiffs well-pleaded complaint arose under a federal treaty, thereby clearly creating a federal question. In *Sequihua v. Texaco, Inc.*, 847 F.Supp. 61, 62-63 (S.D. Tex. 1994), the plaintiffs were residents of a foreign country and sought a decree which would have required a transfer of title to real property located in a foreign nation. In short, there was no state interest in the claim and, instead, the claim directly affected the United States' foreign relations. In *Grynberg Prod. Corp. v. British Gas, p.l.c.*, 817 F. Supp. 1338 (E.D. Tex. 1993), a Colorado oil and gas firm brought suit against a British gas company seeking injunctive relief to settle ownership and production rights to an oil field in Kazakhstan. In contrast, Plaintiffs here (two of whom are Texas residents and one of whom is a Norwegian corporation with a Houston office) seek money damages under Texas tort law for actions performed at least in part in Texas.

³⁶ The German government filed its Note Verbale with the State Department on December 15, 1995. Neither Ruhrgas nor Germany advised this Court of such a filing until mid-January, 1996. By that time, briefing on Ruhrgas' motion to reconsider this Court's arbitration decision had been completed; and it was clear that Ruhrgas' various jurisdictional claims had little support in fact or law. The German filings simply reflect a belated attempt to concoct a jurisdictional barrier.

CONCLUSION

Ruhrgas has not met its heavy burden of proving this case was removable at the time it was filed. Instead, the briefing and evidence clearly show that Ruhrgas filed its Notice of Removal despite the fact that Plaintiffs' Petition raised only state law claims and one of the Plaintiffs was an alien. The cornerstone of Ruhrgas' removal, its arbitration clause with MPCN, does not even apply to Plaintiffs, which is obvious from a reading of the contract itself. There was no legal or factual basis for removal to federal court, and Ruhrgas' discovery calculated to find such a basis failed to do so. This case should be remanded to Texas state court, and Plaintiffs should be awarded their just costs and attorneys' fees for having to engage in this lengthy and expensive waste of the Court's and the parties' time and resources.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this document was served on Defendant's attorneys of record in accordance with Federal Rule of Civil Procedure 5, on February 22, 1996.

/s/ David Schenck

IN THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF TEXAS
 HOUSTON DIVISION

MARATHON OIL COMPANY,	§	
MARATHON INTERNATIONAL	§	
OIL COMPANY, and	§	
MARATHON PETROLEUM	§	
NORGE A/S,	§	CIVIL ACTION
Plaintiffs,	§	NO. H-95-4176
	§	
VS.	§	
	§	
RUHRGAS, A.G.,	§	
	§	
Defendant.	§	

**RUHRGAS AG'S SURREPLY TO PLAINTIFFS'
 REPLY BRIEF ON THEIR MOTION TO REMAND**

TO THE HONORABLE UNITED STATES DISTRICT
 JUDGE:

Ruhrgas AG, subject to and without waiver of its previously filed motions, including but not limited to its Motion to Dismiss for lack of personal jurisdiction, files this Surreply to Plaintiffs' Reply Brief on Their Motion to Remand.

I.

**PLAINTIFFS ARE BOUND TO ARBITRATE
 THEIR CLAIMS UNDER THE CONVENTION**

In the portion of Ruhrgas AG's Response to Plaintiffs' Motion to Remand (Instr. No. 64) addressing subject matter jurisdiction under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,

Ruhrgas AG has focused primarily on the matters which have been addressed to the Court in connection with its Motion for Reconsideration of the Court's November 15, 1995 Order denying Ruhrgas AG's Motion for Stay Pending Arbitration. Specifically, Ruhrgas AG has focused on:

- The arbitrability of Plaintiffs' claims under the "group of companies" doctrine recognized in international arbitration; and
- The evidence which now demonstrates that, contrary to the Court's conclusions in its November 15 Order, Plaintiffs' claims are based on alleged conduct "in relation to MPCN" and are not "independent" of any claims of MPCN.

Plaintiffs' Reply Brief (Instr. No. 67) touches only briefly on the first of these focal points, and is virtually silent on the second.

With respect to the "group of companies" doctrine, Plaintiffs argue that the Court is bound to apply domestic U.S. legal principles in determining whether Plaintiffs are bound to arbitrate their claims. This approach is directly inconsistent with the directives of the U.S. Supreme Court in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S. Ct. 2449 (1974) and *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 630, 105 S. Ct. 3346 (1985), discussed in Ruhrgas AG's Response to Motion to Remand (Instr. No. 64) at 19-20. The Supreme Court in *Scherk* stated that such an approach would "unnecessarily exalt the primacy of United States law over the laws of other countries." 94 S. Ct. at 2456 n.11.

Plaintiffs also argue that the "group of companies" doctrine cannot apply here because "the terms of the

arbitration agreement itself unambiguously *exclude* any application to Plaintiffs." Reply Brief (Instr. No. 67) at 2. In support of this argument, Plaintiffs urge that the Heimdal Gas Sales Agreement "*omits* affiliates from the arbitration provision, despite defining and referring to them elsewhere." *Id.* at 11. None of Plaintiffs' assertions are valid.

While the Heimdal Gas Sales Agreement does refer to "affiliates," none of the references address rights or obligations of affiliated companies. The issue whether affiliates are bound to arbitrate claims which arise out of the Heimdal Gas Sales Agreement is *not* expressly addressed in the arbitration agreement. It was not necessary for the parties to expressly incorporate provisions addressing every possible scenario in which an affiliate would be obligated to arbitrate; the parties were entitled to leave those issues to the applicable rules and law governing the agreement. *See Luling Oil & Gas Co. v. Humble Oil & Refining Co.*, 191 S.W. 2d 716, 724 (Tex. 1945) ("When an agreement is silent or obscure as to a particular subject, the law and usage become a portion of it and constitute a supplement to it and interpret it."); *accord Norfolk and Western Railway Co. v. American Train Dispatchers' Association*, 499 U.S. 117, 111 S. Ct. 1156, 1164 (1991). In that regard, the parties expressly incorporated by reference the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC Rules"), thereby incorporating the international arbitration principles which have been applied under those rules, including the "group of companies" doctrine applied in *Dow Chemical v. Isover Saint Gobain*, Cour d' Appel, Paris, 21

October 1983, 110 J. 899 (1983) IX Yearbook 132 (1984).¹ In *Dow*, the agreement in question specifically referenced Dow Chemical (France), a non-signatory, and expressly provided that Dow Chemical (France) was designated as a company which would deliver products pursuant to the agreement. Notwithstanding these references to Dow Chemical (France) in the agreement, notwithstanding the absence of any provision expressly obligating Dow Chemical (France) to arbitrate, and notwithstanding the absence of a signature by Dow Chemical (France) on the agreements, it was held that Dow Chemical (France) was bound by the arbitration agreement. The panel based its conclusion in large part on the agreement's incorporation of the ICC Rules, and the prior decisions thereunder applying the "group of companies" doctrine. *Id.* at 136.

Applying the *Dow* rationale, not only does the arbitration clause in the Heimdal Gas Sales Agreement not exclude application of the "group of companies" doctrine, the parties' incorporation of the ICC Rules demonstrates that an affiliated company which controlled the negotiation, execution, or performance of the agreement *would* be bound thereby.² As shown in Ruhrgas AG's Response to

¹ A copy of the English translation of the *Dow* decision is attached as Exhibit 21 to Ruhrgas AG's Response to Motion to Remand (Instr. No. 64).

² Plaintiffs assert in the Reply Brief (Instr. No. 67) at 11 n.12 that Ruhrgas AG never addressed this issue in any of its seven arbitration-related briefs. Wrong. Ruhrgas AG made the identical argument in response to the same contention in its Reply to Plaintiffs' Response to Ruhrgas AG's Motion to Reconsider (Instr. No. 47) at 8-9.

Motion to Remand (Instr. No. 64) at 15-19 such control is present here.³

The second focal point of Ruhrgas AG's Response to Motion to Remand with respect to the arbitration issues is the question whether Plaintiffs' claims are based on conduct "in relation to MPCN" and are "independent" of claims of MPCN. In denying Ruhrgas AG's Motion for Stay Pending Arbitration, this Court relied heavily on its conclusions that Plaintiffs' claims were not based on conduct "in relation to MPCN" and that Plaintiffs' claims were "independent" of any claims of MPCN. Memorandum and Order (Instr. No. 38) at 7, 8-9. In its Motion for Reconsideration (Instr. No. 39) of that Order and its other filings in support thereof (Instr. Nos. 47 and 59), and in its Response to Motion to Remand (Instr. No. 64), Ruhrgas AG presented deposition testimony and documentary evidence demonstrating that Plaintiffs' claims

³ Plaintiffs argue in their Reply Brief (Instr. No. 67) at 10 that Ruhrgas AG's control arguments are inconsistent with the argument contained in Ruhrgas AG's Reply to Plaintiffs' Response to Motion to Dismiss for Lack of Personal Jurisdiction that the Marathon personnel dealing with Ruhrgas AG were doing so on behalf of MPCN. There is no inconsistency. It is undisputed that the Marathon personnel dealing with Ruhrgas AG were doing so on behalf of MPCN. Evans Depo. (Ex. 1 to Ruhrgas AG's Response to Motion to Remand) at 23-25, 30; Bossley Depo. (Ex. 2 to Ruhrgas AG's Response to Motion to Remand) at 40-46, 53-54, 59-60, 62-64, 77-78. But it is also undisputed that MOC and MIOC controlled the activities of the Marathon personnel acting on behalf of MPCN. See Ruhrgas AG's Response to Motion to Remand (Instr. No. 64) at 15-19 and Exhibits 22-55 thereto.

are based on conduct "in relation to MPCN" and are not "independent" of any claims of MPCN.

Plaintiffs' Reply Brief (Instr. No. 67) is virtually silent on these issues. Plaintiffs only assert in footnote 11 that "any fraudulent omissions or misrepresentations made to [MOC employees] while representing MPCN necessarily were made to MPCN's lenders as well." Reply Brief (Instr. No. 67) at 10 n.11. This assertion supports, rather than refutes, Ruhrgas AG's contention that Plaintiffs' claims are based on conduct "in relation to MPCN" and are not "independent" of any claims of MPCN. Plaintiffs' assertion acknowledges that the alleged fraudulent conduct of Ruhrgas AG was directed at Marathon personnel "while representing MPCN." Apparently, Plaintiffs are claiming that these representatives were also cognizant of the interests of Marathon Oil Company and Marathon International Oil Company, and also relied on Ruhrgas AG's alleged fraudulent representations and omissions made to MPCN in later acting on behalf of those companies. Nevertheless, alleged fraudulent conduct, allegedly directed at Marathon personnel "while representing MPCN," can be characterized only as conduct "in relation to MPCN," and any claims arising from allegedly fraudulent misrepresentations and omissions made to Marathon personnel "while representing MPCN" cannot be properly characterized as claims which are "independent" of those of MPCN.⁴

⁴ Two additional points raised by Plaintiffs' Reply Brief deserve brief response. First, Plaintiffs, citing *Hornbeck Offshore (1984) Corp. v. Coastal Carriers Corp.*, 981 F.2d 752 (5th Cir. 1993) and *NCR Credit Corp. v. Reptron Elecs., Inc.*, 863

Plaintiffs are bound to arbitrate their claims under the Convention. As such, this Court has jurisdiction of this case pursuant to 9 U.S.C. §§ 203 and 205, and the Motion to Remand should be denied.

II.

NORGE IS NOT A REAL PARTY IN INTEREST AND WAS FRAUDULENTLY JOINED

In their Reply Brief in Support of their Motion to Remand (Instr. No. 67), Plaintiffs continue to assert that Marathon Petroleum Norge A/S ("Norge") holds rights under the Operating Agreement for the Heimdal Field and the Production License for the Heimdal Field,

F. Supp. 1561 (M.D. Fla. 1994), argue that the Fifth Circuit was not suggesting in footnote 4 to its opinion in *In re Talbott Big Foot, Inc.*, 887 F.2d 611 (5th Cir. 1989) that a party in privity with a signatory to an arbitration agreement may be required to arbitrate. Contrary to Plaintiffs' arguments, *Hornbeck* did not address the issue, and *NCR Credit* supports Ruhrgas AG's position. In *NCR Credit*, NCR argued that because it did not sign the arbitration agreement between the defendant and NCR's parent company, its action could not be stayed pending arbitration under 9 U.S.C. § 3, citing *In re Talbott Big Foot, Inc.* The court rejected that interpretation of the opinion, noting that the Fifth Circuit had gone on to suggest that a party in privity with a signatory might be subject to such a stay. 863 F. Supp. at 1566. That interpretation of the footnote is consistent with Ruhrgas AG's position.

Second, Plaintiffs argue that *Astron Industrial Assoc., Inc. v. Chrysler Motors Corp.*, 405 F.2d 958 (5th Cir. 1968) is distinguishable because "there was a substantiated claim of alter ego. . . ." Reply Brief (Instr. No. 67) at 14. The words "alter ego," however, do not appear in the opinion in *Astron*, and no "alter ego" analysis was undertaken in that case.

allegedly supporting claims for (1) alleged participation by Ruhrgas AG in a breach of fiduciary duty by Statoil and (2) tortious interference. In making these arguments, Plaintiffs (1) attempt to rewrite the terms of the Pass Through Agreements by which Norge disposed of its rights in the Heimdal Field, (2) ignore and mischaracterize the testimony of Norge's own chief executive officer, Mr. Finn Engzelius, and (3) attempt to change the nature of Norge's purported claims and their arguments in support thereof, all in a desperate attempt to avoid the jurisdiction of this Court. For the reasons set out in Ruhrgas AG's Response to Plaintiffs' Motion to Remand, and below, Norge is not a real party-in-interest and was fraudulently joined for the purpose of defeating removal jurisdiction.

A. Norge's Purported Assertion of Rights Under the Operating Agreement

The Pass Through Agreements executed by Norge in the 1970s expressly provide that MPCN "shall assume all the rights, benefits, obligations and duties" of Norge under the Operating Agreement. Pass Through Agreements ¶ 3.⁵ Mr. Engzelius, chief executive officer of Norge, acknowledged that by virtue of the Pass Through Agreements, Norge's rights under the Operating Agreement are "suspended." Engzelius Depo. at 76.⁶ Specifically, Mr. Engzelius testified:

⁵ Copies of the Pass Through Agreements are attached as Exhibits 61 and 62 to Ruhrgas AG's Response to Plaintiffs' Motion to Remand (Instr. No. 64).

⁶ The complete transcript of Mr. Engzelius' deposition is attached as Exhibit 3 to Ruhrgas AG's Response to Plaintiffs' Motion to Remand (Instr. No. 64).

Q: . . . would you agree that based on your understanding, any rights of Marathon Petroleum Norge A/S under the Operating Agreement as amended are currently suspended by virtue of the Pass Through Agreements?

A: True.

Id. Furthermore, the July 1980 amendment to the Operating Agreement expressly acknowledges that under the Pass Through Agreements, MPCN "receives all the rights and benefits attributable to [Norge's] interest under the [Operating] Agreement."⁷ This conclusion is consistent with the papers filed by MPCN in the court proceedings it has initiated in Stavanger, Norway against Statoil and the other owners of Statpipe, wherein it alleges that MPCN is the joint venturer. Stavanger Complaint (Ex. 5 to Ruhrgas AG's Response to Motion to Remand) ¶ 1.3. Although Plaintiffs assert in their Reply Brief (Instr. No. 67) at 4, that the Stavanger proceeding "is entirely distinct from the parties and claims in this case," this assertion is not true.

In both the Stavanger Complaint and in the First Amended Petition filed in this case, the following contentions are made: (1) Statoil and the Consortium agreed to lower North Sea gas prices in return for an agreement to commit the Troll gas to Ruhrgas at a reduced price (First Amended Petition ¶ 23; Stavanger Complaint ¶ 4.2); (2) when MPCN refused to lower the price for Heimdal gas,

⁷ The July 1980 amendment to the Operating Agreement is attached as Exhibit 59 to Ruhrgas AG's Response to Plaintiffs' Motion to Remand (Instr. No. 64).

the Consortium unilaterally lowered their payments (First Amended Petition ¶ 24; Stavanger Complaint ¶ 4.3); (3) Statoil assured MPCN that the transportation tariffs would decrease because of increased volumes of gas from the Troll Field, making MPCN's operations more economical (First Amended Petition ¶ 30; Stavanger Complaint ¶ 4.6); (4) contrary to its alleged assurances, Statoil did not send its Troll gas through the Statpipe Pipeline and Statoil's tariff reduction projections have not been fulfilled (First Amended Petition ¶¶ 31, 32; Stavanger Complaint ¶¶ 4.7, 4.8); (5) as a result, MPCN is experiencing a substantial negative cash flow (First Amended Petition ¶ 33; Stavanger Complaint ¶ 4.8). Both actions seek recovery of money for losses sustained.⁸ Norge is not a party to the Stavanger proceedings, and has made no claims, demands, or allegations against Statoil. Engzelius Depo. at 99-100. In short, MPCN is the holder of the rights under the Operating Agreement, not Norge.

⁸ With respect to MPCN's European Commission proceeding, Plaintiffs argue that "no such action has been filed," noting that the document is "merely a draft complaint" Reply Brief (Instr. No. 67) at 4. However, MPCN's letter to Ruhrgas AG dated July 21, 1995, attached at tab 3 to Exhibit B to Ruhrgas AG's Notice of Removal (Instr. No. 1), states that MPCN "has served [Statoil] with a complaint to the European Commission." In any event, whether it has been filed or not, MPCN has made the allegations set out in the "draft complaint" (Exhibit 6 to Ruhrgas AG's Response to Motion to Remand) which include many of the same allegations discussed above with respect to the Stavanger Complaint and the First Amended Petition filed herein. See, e.g., European Commission Complaint ¶¶ 23, 24, 37, 45, 54, 69, 70.

Although these points were made by Ruhrgas AG in its Response to the Motion to Remand (Instr. No. 64) at 41-42, Plaintiffs' Reply Brief ignores them. Instead, Plaintiffs argue that Norge has claims under the Operating Agreement by virtue of the fact that it "remains liable" to the other venturers for obligations under the Operating Agreement. Reply Brief at 18. Prospective *liability* under the Operating Agreement in the event MPCN fails to perform under the Pass Through Agreements does not create *rights* under the Operating Agreement. Under the Pass Through Agreements, MPCN is the current holder of any rights under the Operating Agreement, and MPCN therefore is the real party-in-interest with respect to any claim for breach of obligations arising out of the Operating Agreement.⁹

In summary, Norge does not hold the substantive rights under the Operating Agreement which are sought to be enforced. As such, Norge is not a real party-in-interest with respect to the breach of fiduciary duty claim, and has no possibility of recovery thereon. *Farrell*

⁹ In any event, the causes of action asserted by Norge do not and cannot arise out of any purported liability of Norge to the venturers under the Operating Agreement. As noted above, MPCN assumed responsibility for performing Norge's obligations under both the Operating Agreement and Production License in the Pass Through Agreements. Mr. Engzelius testified that MPCN has performed the obligations which it assumed under the Pass Through Agreements and is not in default of those obligations. Engzelius Depo. at 78-79. Mr. Engzelius acknowledged that Norge has not been required to perform any obligations in connection with the Heimdal Field subsequent to the execution of the Pass Through Agreements. *Id.* at 109-10.

Constr. Co. v. Jefferson Parish, 896 F.2d 136, 140 (5th Cir. 1990).

B. Norge's purported Rights Under the Production License

Plaintiffs also assert that Norge is seeking to enforce rights which it purportedly holds under the Heimdal Field Production License. Specifically, Plaintiffs argue that Norge has a viable tortious interference claim which implicates such rights.

The First Amended Petition alleges a cause of action for tortious interference with MPCN's (not Norge's) prospective business relations:

Marathon's affiliate [MPCN] had (and has) a reasonable probability of entering into business relationships with other gas buyers. Ruhrgas AG maliciously and intentionally prevented (and still is preventing) those relationships from occurring.

First Amended Petition ¶ 46. As shown in Ruhrgas AG's Response to Plaintiffs' Motion to Remand (Instr. No. 64) at 37-38, a corporation cannot pursue a claim for tortious interference with the business relations of its affiliate. *Diesel Systems, Limited v. Yip Shing Diesel Engineering Co., Limited*, 861 F. Supp. 179, 181 (E.D.N.Y. 1994); *Osborn v. Bell Helicopter Textron, Inc.*, 828 F. Supp. 446, 450-51 (N.D. Tex. 1993). In their Reply Brief, Plaintiffs do not challenge this proposition. In short, Norge is not the real party-in-interest with respect to, and has no possibility of recovery on the claim for tortious interference with the prospective

business relations of MPCN, which is the only tortious interference claim asserted in the First Amended Petition.

The lack of pleadings alleging any other tortious interference claim has not stopped Plaintiffs from attempting to expand the scope of Norge's purported tortious interference claims. In their Brief in Support of their Motion to Remand, Plaintiffs asserted that remand is proper based on a claim that Ruhrgas AG had interfered "with Norge's ability to realize the value of its license." Plaintiffs' Brief in Support of their Motion to Remand (Instr. No. 13) at 5. The short answer to Plaintiffs' assertion is that "claims which have not been pled cannot form the basis of an Order of Remand." *Sharp v. CNA Lloyds*, No. H-92-2308, 1992 U.S. Dist. LEXIS 21143, *11 (S.D. Tex. Dec. 22, 1992) (Exhibit A hereto). Because the First Amended Petition does not assert a claim for tortious interference "with Norge's ability to realize the value of its license," such a claim cannot defeat the removal of this case.

In any event, as shown in Ruhrgas AG's Response to Plaintiff's Motion to Remand (Instr. No. 64) at 38-39, Norge has no viable claim for interference with its own prospective business relations. Mr. Engzelius admitted that (1) Norge has engaged in no negotiations to market or sell gas from the Heimdal Field, (2) Norge does not have the right to do so, and (3) Norge has not engaged in any negotiations to convey any reversionary interest it may hold. Engzelius Depo. at 60, 91, 98. In short, it is undisputed that Norge is not attempting to enter into any prospective business relations. In their Reply Brief, Plaintiffs make no effort to challenge these arguments. To the contrary, Plaintiffs acknowledge that Norge can have no

claim for tortious interference with respect to any prospective sale of Heimdal gas until June 1996 at the earliest. Specifically, Plaintiffs state:

Because Ruhrgas AG continues to deny other buyers access to MPCN's produced gas, Norge will have no buyers for its gas when MPCN ceases operations. Thus, *unless Ruhrgas AG undergoes a sudden change of heart, Norge will have additional tortious interference claims in four months.*

Plaintiffs' Reply Brief at 19 (emphasis added). This statement is an acknowledgment by Plaintiffs that Norge does not yet have any right to assert a claim for tortious interference with respect to prospective gas sales. Even if such a claim was set out in the First Amended Petition (and it is not), it would not support a remand.

Having implicitly acknowledged that Norge has no claims for tortious interference with prospective business relations of either MPCN or Norge, Plaintiffs, in their Reply Brief filed on February 22, 1996, assert for the very first time that Norge has a claim for tortious interference with Norge's *existing* contractual relations with MPCN. Plaintiffs' Reply Brief (Instr. No. 67) at 18-19, 23. Specifically, Plaintiffs now assert:

Ruhrgas AG and the Consortium are preventing MPCN from securing new purchasers for produced Heimdal gas, thereby preventing MPCN from performing its obligations to Norge under the Pass Through Agreements.

Plaintiffs' Reply Brief (Instr. No. 67) at 18. Quite simply, a claim that Ruhrgas AG tortiously interfered with the Pass Through Agreements is not in this case. In the section of

Plaintiffs' First Amended Petition setting out Plaintiffs "Causes of Action," the following heading precedes the tortious, interference allegations:

TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS

First Amended Petition at 14. The First Amended Petition asserts only claims for interference with *prospective business* relations, not *existing contractual* relations. As noted above, "claims which have not been pled cannot form the basis of an Order of Remand." *Sharp*, 1992 U.S. Dist. LEXIS 21143, *11 (Exhibit A). Nevertheless, even if such a claim were set forth in the First Amended Petition (and it is not), Norge has no present right to assert any such claim, as shown below.

At the heart of Norge's latest tortious interference allegation is its contention that Ruhrgas AG prevented MPCN from performing its obligations to Norge under the Pass Through Agreements.¹⁰ Yet, it is undisputed that MPCN has not been prevented from performing its obligations to Norge under the Pass Through Agreements. Mr. Engzelius testified that MPCN has performed the obligations which it assumed under the Pass Through Agreements and is not in default of those obligations.

¹⁰ In their Reply Brief (Instrument No. 67) at 18 and n.24, Plaintiffs urge that Mr. Hoffmann of Ruhrgas AG acknowledged in his deposition that Ruhrgas AG has prevented MPCN from securing new purchasers for Heimdal gas. Plaintiffs mischaracterize his testimony. Mr. Hoffmann testified only that it is the Consortium's position that the agreement was not effectively terminated and that MPCN is obligated to sell the gas to the Consortium. Hoffmann Depo. at 275-279.

Engzelius Depo. at 78-79. Mr. Engzelius acknowledged that Norge has not been required to perform any obligations in connection with the Heimdal Field subsequent to the execution of the Pass Through Agreements. *Id.* at 109-10. Plaintiffs' latest desperate attempt to concoct a viable tortious interference claim in favor of Norge, like its other efforts, is defeated by the deposition of testimony of Norge's own chief executive officer.

In any event, Norge cannot assert *any* cause of action (for tortious interference or otherwise) arising out of rights under the Production License, because Norge does not hold those rights. The Production License provides that it grants "an exclusive right to explore for and produce petroleum in the area mentioned" therein.¹¹ In the Pass Through Agreements, Norge assigned the rights under the Production License to MPCN:

[MPCN] shall own and receive without additional compensation *all the rights* of [Norge] to all the petroleum which may be produced and accumulated under the Production License, . . . and [MPCN] shall assume *all the rights*, benefits, obligations and duties of [Norge] under said License. . . .

Pass Through Agreements ¶ 3 (emphasis added). Mr. Engzelius admitted in his deposition that by virtue of the Pass Through Agreements, Norge has not held and does not hold the right to explore for, produce, or sell gas from

¹¹ A copy of the Production License is attached as Exhibit 56 to Ruhrgas AG's Response to Plaintiffs' Motion to Remand (Instr. No. 64).

the Heimdal Field. Engzelius Depo. at 59-60. The substantive rights sought to be enforced in this case are the rights to explore for, produce, and market gas from the Heimdal Field. As Norge does not hold those substantive rights, Norge is not a real party-in-interest, and has no possibility of recovery. *Farrell Const. Co. v. Jefferson Parish*, 896 F.2d at 140.

In their Reply Brief, Plaintiffs argue that the fact that Norge holds no rights to explore for, produce, or sell Heimdal Field gas is irrelevant to the remand issues because Norge allegedly holds legal title to the Heimdal gas under Norwegian law. It is unnecessary to address this issue, however, because, as noted by Ruhrgas AG in its Response to Plaintiffs' Motion to Remand (Instr. No. 64) at 32, the holder of mere legal title is not a real party-in-interest. *Stonybrook Tenants Association, Inc. v. Alpert*, 194 F. Supp. 552, 556 (N.D. Conn. 1961). Plaintiffs do not challenge this proposition in their Reply Brief. Even if it is assumed for purposes of argument that Plaintiffs' characterization of Norwegian law is correct, Norge's purported legal title under the Production License would not render Norge a real party-in-interest, inasmuch as Norge indisputably has conveyed to MPCN the beneficial rights under the Production License, *i.e.*, the right to explore for, produce, and sell the gas.

Plaintiffs also argue that Norge holds justiciable rights under the License because, according to Plaintiffs, it is certain that the rights currently held by MPCN will revert to Norge. Reply Brief at 25. Specifically, Plaintiffs argue that the rights under the License will definitely revert to Norge when the Heimdal Field becomes "uneconomic under then-existing technological conditions," or

when MPCN goes into default under the Pass Through Agreements. Plaintiffs' Reply Brief (Instr. No. 67) at 23. Plaintiffs' arguments are conclusively refuted by the unambiguous language of the Pass Through Agreements, by MPCN correspondence, and by the testimony of Norge's own chief executive officer, Mr. Engzelius.

First, there is nothing in the Pass Through Agreements that remotely suggests that they will terminate when the Heimdal Field becomes uneconomic. The only provision in the Pass Through Agreements concerning termination of the Pass Through Agreements or the possibility of reversion of rights to Norge is paragraph 9 of the Pass Through Agreements, which states:

If [MPCN] defaults on any provision of this Agreement, [Norge] shall have the right to terminate the Agreement with immediate effect.

Pass Through Agreements ¶ 9. Plaintiffs suggestion that the Agreement would terminate or that rights would revert to Norge when the field becomes uneconomic, even if there is no default by MPCN, is nothing but a creation of Plaintiffs; there is nothing in the Pass Through Agreements to support it. To the contrary, it is inconsistent with Mr. Engzelius' testimony that the intent of the Pass Through Agreements was for MPCN to produce and sell *all* of the gas in the field, with Norge selling *none*. Engzelius Depo. at 52, 58.

As noted above, Plaintiffs also contend that a reversion of the rights under the Production License to Norge is certain because it allegedly is certain that MPCN will default. Specifically, Plaintiffs assert that "Ruhrgas' actions assured that MPCN will default under the Pass

Through Agreements because it no longer will be able to sell its gas to anyone after June 1996," the effective date of MPCN's attempted termination of the Heimdal Gas Sales Agreement.¹² Reply Brief (Instr. No. 67) at 25. Plaintiffs fail to make any showing of how a cessation of sales would constitute a default under the Pass Through Agreements. To the contrary, as shown below, MPCN certainly does not consider a cessation of deliveries to constitute a default which will result in a termination of its rights under the Pass Through Agreements.

MPCN's letter (on MOC letterhead)¹³ to the Heimdal Operating Committee and the Heimdal Commercial Committee dated January 25, 1996, attached as Exhibit 6 to Plaintiffs' Reply Brief, gives notice of a suspension of production effective June 11, 1996 "due to not having economic reserves." The letter, a copy of which is attached hereto as Exhibit B, goes on to state that MPCN will inform the Heimdal joint venture "when, in MPCN's opinion, a resumption of MPCN's gas deliveries will be economically viable." The letter also states that MPCN will continue to take its interest in condensate. If a cessation of deliveries in June 1996 would result in a reversion of rights to Norge, there would never be "a resumption of MPCN's gas deliveries" as expressly contemplated in

¹² Ruhrgas AG and the other European buyers have consistently objected to MPCN's attempted termination of the Heimdal Gas Sales Agreement and do not recognize it as effective.

¹³ This letter represents another example of MOC personnel conducting business relating to Heimdal on behalf of MPCN.

MPCN's letter, and MPCN would not be taking any condensate during the period of suspension, as stated in the letter.

Similarly, MPCN sent a letter to Ruhrgas AG dated February 12, 1996, a copy of which is attached hereto as Exhibit C, requesting transportation for "gas delivered during the period 11 June, 1996 through 30 September, 1996." The letter concludes that "additional customers, redelivery points, and volumes may be added as we continue our marketing efforts."

The two letters attached hereto as Exhibits B and C make it clear that MPCN intends to be marketing Heimdal gas after June 11, 1996. These letters absolutely refute any contention that a June 1996 cessation of production will constitute a default under the Pass Through Agreements or that the rights under the Production License are certain to revert to Norge in June 1996.

Mr. Engzelius also refuted Plaintiffs' assertions in his deposition. Mr. Engzelius testified that it is *not* certain that MPCN will cease sales of gas in June 1996, and he specifically acknowledged the possibility that the rights assigned to MPCN under the Pass Through Agreements will *not* revert to Norge in June 1996. Engzelius Depo. at 83-87. Mr. Engzelius also admitted that it is possible that Norge would elect not to terminate the Pass Through Agreements, even if a default by MPCN occurs. Engzelius Depo. at 89. If there could be any doubt that the rights under the Production License may never revert to Norge, any such doubt is completely eliminated by the following testimony of Mr. Engzelius:

Q: Is it your understanding of the pass-through agreements that if Marathon Petroleum Company (Norway) defaults on its obligations under those pass-through agreements and if, based on that default, Marathon Petroleum Norge A/S elects to terminate those pass-through agreements -

A: Uh-huh.

Q: - then at that time the rights assigned under the pass-through agreements would then revert to Marathon Petroleum Norge A/S?

A: That is correct.

Q: That reversion has not yet occurred, has it?

A: No.

Q: *That reversion may never occur; is that right?*

A: *Depending on circumstances, that is right.*

Engzelius Depo. at 91 (emphasis added). In short, at the time of the filing of this lawsuit, at the time of the removal, and at the time of Mr. Engzelius' deposition, it was uncertain whether there would *ever* be a reversion to Norge of the rights to explore for, produce, and sell Heimdal gas, and that uncertainty continues today. As shown in Ruhrgas AG's Response to Plaintiffs' Motion to Remand (Instr. No. 64) at 32-35, the mere possibility of a future reversion of rights under the Production License to Norge constitutes at most a "possibility of reverter" which will not support any cause of action.¹⁴

¹⁴ Plaintiffs include in their Reply Brief a confusing discussion of landlord/tenant law. While Ruhrgas AG fails to

In any event, the only causes of action asserted by Norge in the First Amended Petition are for participation in an alleged breach of fiduciary duty arising out of the Operating Agreement and for tortious interference with MPCN's prospective business relations. As shown above, it is clear that with respect to these causes of action,

comprehend how an assignment of rights under a production license can create a landlord/tenant relationship, it is unnecessary to analyze that issue. Even if Norge is the "landlord" of MPCN with respect to rights under the Production License, any rights of Norge in the Production License could qualify only as a future interest, not as a present interest, because Norge undisputedly does not hold the right to the immediate beneficial enjoyment of the Production License. Restatement of the Law of Property § 153(3)(a). As such, Norge, as landlord, would hold at most a reversionary interest in the Production License. *Id.* §§ 153(1), 154(1). As noted in Ruhrgas AG's Response to Plaintiffs Motion to Remand, there are two types of reversionary interests, a "reversion" (which is not subject to a condition precedent) and a "possibility of reverter" (which is subject to a condition precedent). *Id.* § 154(1) and (2). Because any reversionary interest held by Norge is subject to a condition precedent, *i.e.*, a default by MPCN and termination by Norge, any reversionary interest held by Norge can be characterized only as a possibility of reverter. The authorities cited by Plaintiffs in their Reply Brief stand only for the proposition that a landlord may sue for injury to a "reversion," not a "possibility of reverter." Plaintiffs have not cited a single authority supporting the proposition that a holder of a future interest in property which is subject to a condition which may never occur may sue for damages to the property.

Plaintiffs also assert that if Norge holds a "possibility of reverter," it therefore has a "possibility of recovery." Reply Brief (Instr. No. 67) at 25. The opposite is true. "The holder of a bare possibility of reverter cannot maintain an action for injury to the property and may not join as a party plaintiff in such an action." 31 C.J.S. *Estates* § 105, at 205.

Norge is not a real party in interest and has no possibility of recovery. The court need not inquire further. Norge is properly ignored in determining diversity in this case, and the Motion to Remand should be denied.

III.

FEDERAL QUESTION JURISDICTION EXISTS BECAUSE PLAINTIFFS' PETITION RAISES SUBSTANTIAL FOREIGN AND INTERNATIONAL RELATIONS QUESTIONS

Plaintiffs mischaracterized this basis of jurisdiction in both their Motion to Remand (Instr. No. 12) at 2 (mistakenly labeling it as FSIA removal), and in their Reply Brief (Instr. No. 67) at 26 (mistakenly labeling it as solely act-of-state doctrine removal). Consistently, Ruhrgas AG has stated that removal is proper because Plaintiffs' well-pleaded complaint raises substantial foreign relations questions.¹⁵ Contrary to Plaintiffs' assertions, Ruhrgas AG does not argue that "the Note Verbale and the *Amicus* Brief for the Federal Republic of Germany filed on its behalf have imbued the Plaintiffs' claims with an international aura." Reply Brief (Instr. No. 67) at 26. Plaintiffs' claims *ipso facto* raise substantial questions of foreign relations; the Note Verbale and Amicus Brief demonstrate

¹⁵ See Ruhrgas AG's Notice of Removal (Instr. No. 1) ¶ 7 (citing *Kern v. Jeppesen Sanderson, Inc.*, 867 F. Supp. 525 (S.D. Tex. 1994), *Sequihua v. Texaco Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994), and *Grynberg Production Corp. v. British Gas Corp.*, 817 F. Supp. 1338 (E.D. Tex. 1993) for the proposition that claims raising questions of foreign relations present issues of federal common law); Ruhrgas AG's Response to Motion to Remand (Instr. No. 64) at 44-48 (same).

that Ruhrgas AG was correct when it asserted that Plaintiffs' complaint raised substantial foreign relations questions.

Plaintiffs argue that Fifth Circuit authority holds that "claimed assertions of international issues are 'foreclosed by the familiar well-pleaded complaint rule.'" Reply Brief (Instr. No. 67) at 27. The Fifth Circuit case cited by Plaintiffs, *Aquafaith Shipping, Ltd. v. Jarillas*, 963 F.2d 806 (5th Cir.), cert. denied, 506 U.S. 955 (1992), actually supports Ruhrgas AG's argument. In *Aquafaith Shipping*, the Fifth Circuit clarified the scope of the well-pleaded complaint rule:

The court may have to examine pleadings filed by the defendant in order to determine whether the plaintiff's complaint is in fact 'well pleaded.' Thus, when a court performs its duty to verify that it has jurisdiction, it may be required to survey the entire record, including the defendant's pleadings, and base its ruling on the complaint, on undisputed facts, and on its resolution of disputed facts.

Id. at 808. As shown below, such a survey of the entire record in this case, including the First Amended Petition, the Note Verbale and *Amicus Curiae* brief submitted by the Federal Republic of Germany, and MPCN's European Commission Complaint served on Statoil reveals Plaintiffs' well-pleaded complaint raises a federal question.

Plaintiffs argue that "the German filings themselves demonstrate that this case does not involve questions of foreign relations." Reply Brief (Instr. No. 67) at 28. In fact,

the Note Verbale identifies a number of *independent* foreign relations concerns raised by Plaintiffs' complaint.¹⁶ Plaintiffs' Reply, in a footnote, takes issue with only one of the concerns raised in the Note Verbale, Germany's characterization of the lawsuit's effect on the price of German gas. Reply Brief (Instr. No. 67) at 29 n.35. Plaintiffs' attempt to characterize Germany's "real" interest as a desire to see Ruhrgas AG win is without any support in the record, and is a reflection of Plaintiffs' inability to address substantively the foreign and international relations concerns identified by the Federal Republic of Germany. Furthermore, Plaintiffs offer no reply to Ruhrgas AG's argument that MPCN itself has acknowledged in its European Commission Complaint that the matters in dispute implicate foreign relations. See Ruhrgas AG's Response to Motion to Remand (Instr. No. 64) at 46 and European Commission Complaint ¶¶ 63, 64.

Plaintiffs cite *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1325 (5th Cir. 1985) for the proposition that the Fifth Circuit has refused to usurp state law unless the asserted "interest . . . relate[s] to an articulated congressional policy or directly implicate[s] the authority and duties of the United States as a sovereign." Reply Brief (Instr. No. 67) at 27. In fact, the Fifth Circuit in *Jackson* quoted the United States Supreme Court decision of *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S.

¹⁶ Other courts have recognized that the protests of foreign governments deserve weight when deciding whether a plaintiff's well-pleaded complaint raises international relations questions. See *Sequihua*, 847 F. Supp. at 62-63; *Grynberg Prod. Corp.*, 817 F. Supp. at 1356-57.

630, 641 (1981), which held federal common law exists over "international disputes implicating the conflicting rights of States *or our relations with foreign nations*. . . . In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control." *Id.* at 1323-24 (emphasis added).¹⁷

Plaintiffs claim that removal is improper because their claims are "garden-variety fraud and tort claims" and that Plaintiffs do not seek injunctive relief that would "interfere with the title to property in a foreign state." Reply Brief (Instr. No. 67) at 27-28. However, Plaintiffs cite no authority for the proposition that these factors are a prerequisite for exercising jurisdiction. To the contrary, *Kern*, *Grynberg* and *Sequihua* illustrate they are not.

In *Kern*, plaintiffs brought tort claims arising out of two plane crashes in Nepal; no injunctive relief was sought. Although Plaintiffs continue to mischaracterize *Kern* as finding a federal question only because of a "federal treaty," Reply Brief (Instr. No. 67) at 28-29, Ruhrgas AG already responded to this argument:

¹⁷ Plaintiffs also cite *First Haw. Bank v. Alexander*, 558 F. Supp. 1128 (D. Haw. 1983) for the proposition that foreign relations are not implicated in this suit. Reply Brief (Instr. No. 67) at 27-28. *Alexander* related to whether a *private cause of action* existed under a federal statute. It has no bearing on this suit.

Plaintiffs offer an incomplete and inaccurate explanation of *Kern*, stating that Plaintiffs' complaint in *Kern* arose under a "federal treaty" thereby creating federal question jurisdiction only on that ground. Plaintiffs' Brief in Support of their Motion to Remand (Instr. No. 13) at 10 n.2. Although that was one basis of jurisdiction in *Kern*, the *Kern* court also found federal question jurisdiction existed, independently, because of the "international issues in the case." *Kern*, 867 F. Supp. at 531-32.

Ruhrgas AG's Response to Motion to Remand (Instr. No. 64) at 47. *Kern's* support of subject matter jurisdiction in this case probably explains Plaintiffs continued misreading of it.

In *Grynberg*, the court found that the plaintiffs conversion claim under Texas law for money damages raised substantial questions of international relations on which the well-pleaded complaint must rely. 817 F. Supp. at 1364-65. The court noted that the conversion claim required pleading and proof that conduct of Kazakhstan in the disposition of contract rights relating to mineral resources in Kazakhstan was unlawful, and that such an allegation "is by itself an allegation implicating federal international relations law." *Id.* Similarly, Plaintiffs expressly allege here that Statoil, the Norwegian state-owned oil company, undertook unlawful actions in connection with the development and transportation of Norwegian natural resources. See Plaintiffs' First Amended Petition ¶ 6, 11-13, 16-19, 20-22, 23-24, 30-32, 51-54, 57, 60-62. As in *Grynberg*, such allegations alone implicate federal foreign relations law, supplying a basis for removal.

In *Sequihua*, the court held that nuisance claims asserted by the plaintiffs required plaintiffs to challenge the policies, regulations, and approvals of Ecuador to show that the challenged conduct was improper. 847 F. Supp. at 62-63. Such a challenge raised substantial international relations questions invoking federal law. *Id.* Similarly, as noted above, Plaintiffs here challenge the actions of the Norwegian state-owned oil company in regard to the development and transportation of Norwegian natural resources.

Plaintiffs have made no substantive challenge to the foreign and international relations concerns raised by this case which have been identified by the Federal Republic of Germany and Ruhrgas AG. In fact, MPCN's allegations in its European Commission Complaint confirm that this case implicates substantial foreign and international relations issues. Plaintiffs are unable to distinguish *Kern*, *Sequihua*, and *Grynberg*, which support the removal of this action. The Motion to Remand should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on counsel of record for Plaintiffs via Certified Mail Return Receipt Requested and Federal Express on this 1st day of March, 1996.

/s/ Ben H. Sheppard, Jr.
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY,	§	
MARATHON INTERNATIONAL	§	
OIL COMPANY, and	§	CIVIL ACTION
MARATHON PETROLEUM	§	NO. H-95-4176
NORGE A/S,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
RUHRGAS, A.G.,	§	
	§	
Defendant.	§	

PLAINTIFFS' SURREPLY TO MOTION
TO DISMISS FOR LACK OF
PERSONAL JURISDICTION

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY,	§	
MARATHON INTERNATIONAL	§	
OIL COMPANY, and	§	CIVIL ACTION
MARATHON PETROLEUM	§	NO. H-95-4176
NORGE A/S,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
RUHRGAS, A.G.,	§	
	§	
Defendant.	§	

PLAINTIFFS' SURREPLY TO MOTION
TO DISMISS FOR LACK OF
PERSONAL JURISDICTION

Plaintiffs Marathon Oil Company, Marathon International Oil Company and Marathon Petroleum Norge A/S file this Surreply in opposition to Ruhrgas' motion to dismiss for lack of personal jurisdiction.

I. SPECIFIC JURISDICTION

Ruhrgas wrongly claims that the causes of action at issue in this case did not "arise" in Texas. But the question is *not* limited to whether the cause of action "arose" in Texas or the United States. Nor is the "arising from" component so limited. Instead, as stated by the Supreme Court, the question is whether the cause of action arises in or relates to the defendant's contact with the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183 (1985); *Trinity Industries, Inc. v. Myers &*

Assocs., Ltd., 41 F.3d 229, 230 (5th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 52 (1995). A cause of action arises from or relates to a forum contact where a "but for" relationship exists between the contact and the cause of action. *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 (5th Cir. 1981). Personal jurisdiction is also proper where the defendant's acts outside the forum have foreseeable effects within the forum. *Id.* at 1269. Plaintiffs complain here of being misled about the circumstances surrounding the development of the Heimdal gas field. In particular, Plaintiffs claim that there was an [sic] material, undisclosed relationship between Ruhrgas and Statoil. The evidence confirms numerous trips and telexes directed to Plaintiffs in Houston dealing with the Heimdal field and its attendant profitability. Were it not for these communications, Plaintiffs would not have been induced to fund the venture. Thus, these contacts, standing alone or considered together, would support specific jurisdiction. Similarly, jurisdiction is also proper under an effects analysis; Ruhrgas knew that MOC and MIOC were based in Houston, but failed to reveal its relationship with Statoil or to divulge the true plans for the development of North Sea gas throughout the 1980's.

A. The "Arising From" Test.

A cause of action "arises from" contacts with the forum state if, considering the course of events involved in the claim, the contacts form an integral part of the defendant's tortious activity. *See Burger King*, 471 U.S. at 479, 105 S.Ct. at 2185 (court should consider prior negotiations, future consequences and parties' actual course of dealing); *State Street Capital Corp. v. Dente*, 855 F.Supp.

192, 195 (S.D. Tex. 1994) (same). Ruhrgas' tortious conduct clearly included the series of meetings in Houston and its voluminous correspondence and telecommunications with Marathon entities in Houston.

Contrary to Ruhrgas' arguments, the 1987 Houston meeting was a significant element in its tortious plan. For the first time, Ruhrgas claimed that because of lack of a government approval for Distrigaz, a Belgian company with a 15% interest in the Heimdal gas, it had *no* obligation to purchase Heimdal gas at the promised price. **Exhibit A.** Using that "governmental approval" excuse, Ruhrgas underpaid its obligations for years before it was required in an arbitration to bring its obligations current. Ruhrgas did not immediately pay the arbitration award, however, but used it as a bargaining chip in the Houston negotiations. Moreover, the arbitration result excluded the Distrigaz gas volumes from the ongoing agreement, and Ruhrgas refused to provide transportation to sell this gas to any other buyers. This was the background for the next two meetings in Houston, which simply implemented Ruhrgas' plan to lower the Heimdal price with the ongoing threat to Marathon of the total loss of revenue for the Distrigaz volumes.

Ruhrgas' actions aimed at tortiously controlling, and denying, access to European markets continued, reflected in its refusals to provide transportation information as shown in correspondence to Houston, even into 1996. **Exhibit B.** Thus, Ruhrgas' scheme to persuade Plaintiffs to fund the pipeline system that effected the Ruhrgas stranglehold on Heimdal gas culminated in the series of meetings and communications *purposefully directed* to Plaintiffs in Houston.

These numerous contacts with Texas, as well as the visits of Ruhrgas employees to Texas for the express purpose of negotiations regarding the Heimdal field establish that Ruhrgas reasonably should have anticipated that it could be haled into court in Texas. *See Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 420-21 (5th Cir. 1993). Specific jurisdiction exists where, as here, the business contacts with the forum are allegedly designed to further the scheme to defraud. *See Dent Mfg., Inc. v. Zafir*, No. 94-2532, 1995 U. S. Dist. LEXIS 15045, at *36 (E.D. Pa. Oct. 12, 1995).

Here Ruhrgas knowingly reached out to Plaintiffs through its communications, as well as visits to Texas, to effect its plan to fund the pipeline to Emden, then to ensure the flow of gas from 1986 to the present at below the agreed price. Thus Ruhrgas' contacts constituted a purposeful availing of this forum. *See Burger King*, 471 U. S. at 480-81, 105 S. Ct. at 2186 (defendant "reached out" to forum state and envisioned continuing and wide ranging contacts with plaintiff); *First Miss. Corp. v. Thunderbird Energy, Inc.*, 876 F. Supp. 840, 844 (S.D. Miss. 1995) (defendants "reached out" through negotiations by letter, facsimile and telephone); *Fabry Glove & Mitten Co. v. Spitzer*, 908 F. Supp. 625, 632 (E. D. Wis. 1995) (defendant deliberately engaged in a "continuing business relationship" with forum plaintiff).

Ruhrgas' plan was effected by omissions as well as misrepresentations. Ruhrgas' failure to disclose the nature and extent of its secret relationship with Statoil and its knowledge of North Sea gas transportation routes during the course of the Texas meetings constitutes fraud. The failure to disclose material facts during the course of

meetings within the forum certainly is relevant to the jurisdictional question.¹ In Texas, a person has a duty to disclose material facts in connection with commercial negotiations where, among other things, he should know that his opponent relies on the non-existence of the fact.²

Ruhrgas' purpose in the three Houston visits was to first announce that the parties had no agreement, then to negotiate a new agreement through fraud and duress. Plaintiffs' claim could thus hardly arise more directly from Ruhrgas' Texas contacts. See *Sherman Assocs. v. Kals*, 899 F. Supp. 868, 871 (D. Conn. 1995) (defendant came to forum to solicit business relationship that led to litigation); *Enviroplan, Inc. v. Western Farmers Elec. Co-Op.*, 900 F. Supp. 1055, 1061 (S. D. Ind. 1995) (visits necessitated by issues related to performance of agreement held purposeful availment). These numerous contacts were, of course, meaningful to the Ruhrgas scheme, and hence Plaintiffs' claims, and even one such contact is sufficient. *Pritzker v. Yari*, 42 F.3d 53, 61 (1st Cir.), cert. denied, ___ U.S. ___, 115 S.Ct. 1959 (1995) (citing *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957)).

¹ E.g., *WNS, Inc. v. Farrow*, 884 F.2d 200 (5th Cir. 1989) *Pizzabioche v. Vinelli*, 772 F. Supp. 1245, 1250 (M.D. Fla. 1991); *Rockshots, Inc. v. Comstock Cards, Inc.*, No. 87-CIV. 3453-CSH, 1990 WL 74514, at * 2 (S.D.N.Y. May 29, 1990).

² See generally *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432 (Tex. 1986); *Chase Comm. Credit Corp. v. Datapoint Corp.*, 774 S.W.2d 359 (Tex. App. - Dallas 1989, no writ); *Moore & Moore Drilling Co. v. White*, 345 S.W.2d 550, 555 (Tex. Civ. App. - Dallas 1961, writ ref'd n.r.e.); *Moore v. Dallas Post Card Co.*, 215 S.W.2d 398, 403 (Tex. Civ. App. - Dallas 1948, writ ref'd n.r.e.).

B. The "Relatedness" Test

The disjunctive nature of the *Burger King* specific jurisdiction test, "aris[ing] out of or relat[ing] to," "portends added flexibility and signals a relaxation of the applicable standard." *Ticketmaster - New York, Inc. v. Alioto*, 26 F.3d 201, 206 (1st Cir. 1994); *Pritzker*, 42 F.3d at 62 ("relatedness test is, relatively speaking, a flexible, relaxed standard"). So it is little wonder Ruhrgas ignores this element of the calculus.

When a cause of action is connected to negotiations in the forum, even if the claim did not arise from these negotiations,³ the constitutional requirement is satisfied. See *Southwire Co. v. Trans-World Metals & Co.*, 735 F.2d 440, 442 (11th Cir. 1984). What is required is that the defendant's forum contacts place it in "tortious striking distance of the plaintiff." *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 n.21 (5th Cir. 1981); see *Nowak v. Tak How Investments, Ltd.*, 899 F. Supp. 25, 29-30 (D. Mass. 1995) (applying *Prejean* test).

It cannot seriously be claimed that meetings in Texas with "representatives of MPCN," who Ruhrgas knew to be employees of the Plaintiffs, do not "relate to" this litigation, the defendant and the forum. It should have been obvious that the information from these meetings would be shared with the Plaintiffs - indeed, Ruhrgas' discussions regarding the Heimdal field were made to employees of MOC.⁴ Likewise, Ruhrgas knew that

³ Here, of course, Plaintiffs' claims also directly arose from Ruhrgas' Texas contacts.

⁴ In fact, Ruhrgas executives met directly with top officials of Plaintiffs. **Exhibit A; Deposition of Wolf-Dietrich Hoffman at 183-84 (Exhibit C).**

information it sent by telex would be provided to Plaintiffs. In fact, many of these telexes were sent directly to Plaintiffs. Thus, not only was this communication foreseeable, it was deliberate.

The future consequence and, indeed, object of Ruhrgas' forum activity was to trap Plaintiffs into funding a one-sided transaction, wherein Plaintiffs' affiliate could sell Heimdal gas only through Emden, only to the Consortium, and only on terms under the sole dictate of the Consortium. At the least, Ruhrgas' Texas contacts formed the "intermediate step" that led to its real object. See *Burger King*, 471 U. S. at 479, 105 S.Ct. at 2185. Thus, the relatedness requirement is satisfied. See *Nowak v. Tak How Investments, Ltd.*, 899 F. Supp. at 31.

C. The "Effect" in Texas

In an effort to deflect from its substantial contacts with Texas, Ruhrgas now urges that its actions could only have caused foreseeable damage to MOC and MIOC in Ohio, where they previously were headquartered, but not Houston, where these Plaintiffs relocated in 1983.⁵ This argument overlooks Plaintiffs' specific allegation that "Ruhrgas has participated in a series of interconnected wrongful acts relating to the solicitation of funding,

⁵ Essentially, Ruhrgas' argument is that they defrauded Plaintiffs while they were in Ohio, and that by the time they moved to Houston, the damage already had been done. Ruhrgas was aware, however, by 1983 (Exhibit D) that Plaintiffs had moved their offices to Houston, and communicated directly with Houston thereafter. E.g., Exhibit 3 to Pls' Resp. to Motion to Dismiss for Lack of Personal Jurisdiction.

development, and subsequent operations of gas fields. . . . The wrongful conduct alleged in this petition has been continuing for many years, has caused continuing injury to the plaintiffs, and is still ongoing." Pet. ¶ 6 (emphasis added). In other words, even if the initial fraud took place while some of the Plaintiffs were Ohio residents, Plaintiffs allege that the fraud continued long after they moved to Houston, and has caused them continuing damages every year.⁶

It has been found constitutionally sufficient that jurisdiction be based on an act outside the forum which results in injury within the forum. *Star Brite Distributing, Inc. v. Gavin*, 746 F. Supp. 633, 636 (N.D. Miss. 1990) (*prima facie* allegation of fraud that injured persons within state held sufficient). And although Ruhrgas had extensive contacts with Texas, no actual physical act in the United States is necessary if outside activities have foreseeable consequences within the state. *Standard Fittings Co. v. Sapag, S.A.*, 625 F.2d 630, 643 (5th Cir. 1980), *cert. denied*, 451 U.S. 910, 101 S.Ct. 1981 (1981); see also *Blanchard & Co. v. Spectrum Numismatics, Inc.*, No. 93-2554, 1994 U.S. Dist. LEXIS 15369, at *8 (E.D.La. Oct. 26, 1994) (foreseeable that effects of contractual breach and tortious interference would be felt within state when moneys not properly remitted to resident plaintiff); *Snow v. American Morgan Horse Ass'n, Inc.*, No. 93-463-JD, 1994 U.S. Dist. LEXIS 13602, at *22 (D.N.H. Sept. 20, 1994) (knowledge

⁶ Plaintiffs' advances to MPCN did not stop in the early 1980's; instead, such advances continued to be made based on Ruhrgas' fraudulent omissions and misrepresentations for well over a decade.

that impact would be felt in forum constitutes purposeful contact or substantial connection so that jurisdiction is proper over tortfeasor).⁷

Ruhrgas knew that its actions would result in a loss of \$500 million to Plaintiffs. **Exhibit E.** While, according to Dr. Hoffman, this may not be a significant amount to Ruhrgas, such a loss was certainly an impact of constitutional dimension to Plaintiffs, and not only foreseeable but a certainty to Ruhrgas as it implemented its tortious strategy.

II. GENERAL JURISDICTION

Ruhrgas relies primarily on *Helicopteros*⁸ for its argument that general jurisdiction is hardly ever present, and is not established here. But, to the contrary, general jurisdiction is appropriate when forum contacts are "continuous and systematic," the key distinction in this case and *Helicopteros*.

Ruhrgas exaggerates the contacts in *Helicopteros* while inaccurately minimizing its own links with Texas. Helicol, the non-resident in *Helicopteros*, had one executive level meeting in Texas; its other visits were temporary training visits as part of the purchase of a package of

⁷ In comparison the claim at issue in *Southmark* concerned an oral agreement negotiated in "Atlanta and/or New York," and there was no evidence the non-resident aimed at, or even knew its actions could affect, the Texas forum. *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772-73 (5th Cir. 1988).

⁸ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 413, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

goods. *Helicopteros*, 466 U.S. at 411-17.⁹ In contrast, Ruhrgas' high level executives met three times in Houston to discuss Heimdal and now attend more than a dozen meetings in Texas a year (not to mention the numerous meetings Ruhrgas executives attend each year for their other businesses across the United States). Instead of brief training visits, Ruhrgas maintains employees full time in Houston as part of its work with TERC, which, in turn, is intended to effect its aim to enter the United States gas market. **Exhibit F.** Of course, Ruhrgas' interest in the United States, and especially Texas, is understandable given that – unlike Helicol – it has substantial business holdings here and two of its largest shareholders are United States oil companies.

Ruhrgas' contacts with the United States generally, as discussed in Plaintiffs' Response, are extensive, systematic and have been continuous for a number of years. Ruhrgas makes little attempt to dispute the extent of these contacts, but coyly argues that Fed. R. Civ. P. 4(k)(2) may be inapplicable since Plaintiffs haven't proved

⁹ Respondents' Brief in the United States Supreme Court admitted that:

"[Helicol] did no advertising in the United States; did no recruiting in the United States had no agent for service in the United States; signed no contracts in the United States; had no employees located in the United States; had no officers or directors located in the United States; had no stockholders in the United States; did no work in the United States; and had no offices in the United States."

Dennis G. Terez, *The Misguided Helicopteros Case: Confusion in the Courts over Contacts*, 37 BAYLOR L. REV. 913, 922 n.49 (1985).

Ruhrgas is *not* subject to jurisdiction in one of the fifty states. But Plaintiffs have met their burden by asserting the applicability of Rule 4(k)(2), and Ruhrgas does not assert that it is subject to jurisdiction elsewhere so as to obviate the Rule. If the Court finds federal question jurisdiction, Ruhrgas' United States contacts establish personal jurisdiction as well.

III. CONCLUSION

Ruhrgas has repeatedly visited and corresponded with Plaintiffs and their affiliate in Texas – in connection with the Heimdal gas field and with the very issues before the Court. Ruhrgas also maintains a constant presence in Texas through its own employees and its other business activities conducted by its affiliates in Texas. Ruhrgas is subject to specific and general personal jurisdiction in Texas and may constitutionally be haled into a Texas court. Its motion to dismiss should be denied.

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CERTIFICATE OF SERVICE

A copy of this document was served on Defendant's attorneys of record in accordance with Federal Rule of Civil Procedure 5 on March 4, 1996.

/s/ David Schenck

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY,	§	
MARATHON INTERNATIONAL	§	
OIL COMPANY, and	§	CIVIL ACTION
MARATHON PETROLEUM	§	NO. H-95-4176
NORGE A/S,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
RUHRGAS, A.G.,	§	
	§	
Defendant.	§	

RUHRGAS AG'S RESPONSE TO PLAINTIFFS'
SURREPLY TO MOTION TO DISMISS
FOR LACK OF PERSONAL JURISDICTION

TO THE HONORABLE UNITED STATES DISTRICT
JUDGE:

Ruhrgas AG respectfully submits this Response to Plaintiffs' Surreply to Motion to Dismiss for lack of personal jurisdiction.

1. In the various motions and responses which have been filed with the Court since the inception of this case, Plaintiffs have continually made factual assertions concerning alleged wrongful conduct of Ruhrgas AG without any evidentiary support. Plaintiffs continue this practice in their Surreply to the Motion to Dismiss for lack of personal jurisdiction (Instr. No. 69). Plaintiffs claim without evidentiary support that they were "misled" by communications made in the three meetings in Houston and in telexes sent by Ruhrgas AG to Houston, and that "were

it not for these communications, Plaintiffs would not have been induced to fund the venture." Surreply (Instr. No. 69) at 2.

2. The time has passed for making broad allegations unsupported by any evidence Plaintiffs' burden in responding to a motion to dismiss for lack of personal jurisdiction is to come forward with *prima facie* evidence of a tort committed by Ruhrgas AG in Texas. *See Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772-73 (5th Cir. 1988). Plaintiffs have not come forward with a shred of evidence showing that they were "misled" as a result of anything that was said to Marathon Petroleum Company (Norway) ("MPCN") in any of the three Houston meetings or as a result of any of the correspondence sent to Texas in connection with Ruhrgas AG's dealings with MPCN under the Heimdal Gas Sales Agreement. Plaintiffs have not come forward with a shred of evidence showing that "Plaintiffs would not have been induced to fund the venture" if not for statements made in the three Houston meetings or the correspondence sent to Texas. The factual assertions made in the Surreply are not supported by any evidence. In fact Plaintiffs' factual assertions are contrary to the record before the Court. For example, Plaintiffs assert in the Surreply that Ruhrgas AG sent a letter (Deposition Exhibit 175) to Houston in November 1989 which constitutes conduct of Ruhrgas AG in Texas. Surreply to Motion to Dismiss (Instr. No. 69) at 3 and Exhibit B thereto. In fact, the record shows that that

letter is an unsigned draft. Hoffmann Depo. at 273. Plaintiffs first saw that letter when it was produced by Ruhrgas AG in the discovery in this case.¹

In short, Plaintiffs have failed to meet their burden of presenting *evidence* of a tort committed by Ruhrgas AG in Texas.

3. Plaintiffs also argue in their Surreply that their causes of action need not arise out of Ruhrgas AG's Texas Contacts. Plaintiffs urge that it is sufficient if those causes of action "relate to" those contacts. It is clear, however, that in the Fifth Circuit, the defendant's contacts with the forum state must be "directly related" to the cause of action to establish specific jurisdiction. *Wilson v. Belin*, 20 F.2d 644, 647 (5th Cir. 1994). Plaintiffs have failed to come forward with any evidence of a direct link between the three Houston meetings or the Houston correspondence and the alleged causes of action. Marathon's own minutes of the Houston meetings and the correspondence sent to Houston reflect only matters concerning performance and negotiations between Ruhrgas AG and the other European buyers and MPCN under the Heimdal Gas Sales Agreement. See Exhibits 2, 3, and 7 to Plaintiffs' Response to Motion to Dismiss.

4. Plaintiffs suggest that Ruhrgas AG's contacts with Texas in the course of its contractual relationship with MPCN allows the assertion of specific jurisdiction,

¹ The table attached hereto as Appendix A reflects some of the other wrong factual assertions made by Plaintiffs in their Surreply. Ruhrgas AG denies all of Plaintiffs' factual assertions.

even if there is no direct relationship between those contacts and Plaintiffs' causes of action. As noted above, this is not the law in the Fifth Circuit. Furthermore, it cannot be said, as argued by Plaintiffs, that Ruhrgas AG purposely availed itself of the benefits and protections of Texas law, or that Ruhrgas reasonably could have anticipated being haled into court in Texas by virtue of its contractual dealings with MPCN. Plaintiffs' argument is refuted by the terms of the contract itself. The Heimdal Gas Sales Agreement expressly provides that it shall be governed by the laws of Norway, and that any disputes arising out of or relating to the Agreement will be resolved in arbitration in Stockholm, Sweden. In their dealings under the Heimdal Gas Sales Agreement, Ruhrgas AG and MPCN were invoking the benefits and protection of *Norwegian* law, and could only anticipate being haled into *arbitration* in *Sweden*. Further, the subject matter of the agreement, Norwegian gas, is located outside of Texas, the agreement was negotiated and signed in Europe, all payments for the gas have been made outside of Texas, and so performance under the agreement was to occur in Texas. These facts make this case unlike any of the cases cited by Plaintiffs in their Surreply. To the contrary, the Fifth Circuit's decision in *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026 (5th Cir. 1983) *Cert. denied*, 466 U.S. 962 (1984), demonstrates that personal jurisdiction in Texas cannot be predicated on the contractual dealings between Ruhrgas AG and MPCN.

In *Hydrokinetics*, a Texas corporation brought a breach of contract claim against an Alaskan corporation

arising out of the manufacture of goods in Texas. Payment for the goods by the Alaskan corporation was to be made in Texas, the parties engaged in extensive communications in Texas, officers of the Alaskan corporation traveled to Texas to finalize the agreement and to resolve disputes under the agreement, and the contract was formally created in Texas. Nevertheless, the Fifth Circuit held that these contacts were not sufficient to establish specific jurisdiction, noting that the agreement provided that Alaska law would govern, and that no performance under the contract was to take place in Texas, other than payment for the goods. *Id.* at 1028-29.

The contractual dealings involved in *Hydrokinetics* are indistinguishable from those involved here. In fact, a more powerful case for dismissal is presented here by virtue of the arbitration clause in the Heimdal Gas Sales Agreement providing for arbitration of disputes in Sweden, which conclusively shows that Ruhrgas AG could not have reasonably anticipated being haled into court in Texas by virtue of its dealings with MPCN in connection with the Heimdal Gas Sales Agreement.

5. Plaintiffs' only remaining argument for specific jurisdiction is that Plaintiffs allegedly suffered injuries in Texas. Yet, the U.S. Supreme Court has expressly rejected the argument that the foreseeability of causing injury² in the forum state is sufficient to establish personal jurisdiction:

² Ruhrgas AG denies that it has caused injuries to Plaintiffs, and further denies that any such injuries were foreseeable in Texas or elsewhere.

Although it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction. Instead, 'the foreseeability that is critical to due process analysis is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1984) (citing *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (emphasis in original) (footnote omitted)). As shown above, Ruhrgas AG could not have reasonably foreseen being haled into court in Texas as a result of its contractual dealings with MPCN.

Ruhrgas AG respectfully submits that its Motion to Dismiss for Lack of personal jurisdiction should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on counsel of record for Plaintiffs via Federal Express this 8th day of March, 1996.

/s/ Ben H. Sheppard, Jr.
 BEN H. SHEPPARD, JR.

IN THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF TEXAS
 HOUSTON DIVISION

MARATHON OIL COMPANY,	§	
MARATHON INTERNATIONAL	§	
OIL COMPANY, and	§	CIVIL ACTION
MARATHON PETROLEUM	§	NO. H-95-4176
NORGE A/S,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
RUHRGAS, A.G.,	§	
	§	
Defendant.	§	

PLAINTIFF'S RESPONSE TO SURREPLY
 TO MOTION TO REMAND

Typically, one would assume that a motion had been fully briefed once the Reply brief had been filed. A Surreply brief, if necessary, generally would focus only on new matters raised by the Reply brief. Because Ruhrgas' twenty-three page Surreply brief exceeds these accepted parameters, Plaintiffs file the following response.

I. THE ARBITRATION CANARD

Rhurgas' assertion that *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 630 (1985) require this Court to ignore U.S. legal principles in determining whether there is any basis for arbitration is palpably

wrong. In fact, *Mitsubishi* itself confirms that this question is resolved as a matter of federal law¹ by reference to generally recognized principles of contract. 473 U.S. at 625-26; accord *First Options of Chicago v. Kaplan*, 115 S. Ct. 1920 (1995); *Becker Autoradio U.S.A., Inc. v. Becker Autoradwerk*, 585 F.2d 39, 43 (3d Cir. 1978); *In re Ferrara, S.p.a.*, 441 F. Supp. 778, 780 (S.D.N.Y. 1977), *aff'd*, 580 F.2d 1044 (2d Cir. 1978). Moreover, neither *Mitsubishi* nor *Scherk* even addressed the question of whether the parties had agreed to arbitrate; it was undisputed in each case that the parties had made such an agreement. Instead, the only question before the Court in both cases was whether U.S. law made their particular claims unarbitrable.

A. The Reference to ICC Rules Did Not Endorse The "Group of Companies" Rule That Ruhrgas Would Have This Court Create

Ruhrgas' argument that Plaintiffs consented to arbitration because the MPCN/Ruhrgas contract refers to ICC rules is absurd. As Ruhrgas has acknowledged, none of the plaintiffs were even parties to that contract, so they could not have "consented" to the incorporation of the

¹ The parties in that case were Swiss and Japanese Corporations. The agreement provided for arbitration in Japan according to Japanese rules. The agreement also provided for the application of Swiss substantive law. *Mitsubishi Motors Corp. v. Soler-Culver Co.*, 723 F.2d 155, 159 n.3 (1st Cir. 1987). (Nonetheless, the Supreme Court concluded, as had the First Circuit, that U.S. law of contract governed the antecedent question of whether an agreement to arbitrate existed.

loose notions of international law to which Ruhrgas now subscribes.²

1. Not even *Dow* suggest the rule Ruhrgas proposes.

While Ruhrgas urges that the Court should "follow" international law by binding corporate affiliates to each others' contracts simply because they are affiliated, Ruhrgas' argument does not even track foreign international law, let alone controlling U.S. law. Thus, when urging this Court to adopt its "all affiliates must arbitrate rule," Ruhrgas actually is asking the Court to create new law, not only for the United States but for the entire globe.

As Plaintiffs previously have explained, the *Dow* decision does not address the situation in which a non-party to the contract is compelled to arbitrate. Ruhrgas dismisses this reading as mere "wishful thinking" and continues inexorably to recite its *Dow* refrain.³ See Ruhrgas Reply to Mot. to Reconsider (filed 12/22/95) at 7. Plaintiffs' reading of *Dow*, according to Ruhrgas, would

² See *United States v. Flattum*, No. 93-30126, 1994 WL 88887, at *1 (9th Cir. 1994) (forum selection clause applies only to parties to contract); *National Hydro Sys. v. Summitt Corp.*, 731 F. Supp. 264, 267 (N.D. Ill. 1989) (choice of law clause discounted where contract was in question).

³ Despite its constant repetition of the *Dow* argument, Ruhrgas has yet to explain how even the signatories to the MPCN/Ruhrgas contract silently could have intended to incorporate the reasoning of a controversial Parisian appellate decision that had not even been translated from French or published at the time the contract was signed.

be untenable, as it would be contrary to the rule of mutuality if the companies related to the party requesting arbitration could join in an ongoing arbitration by consent while the opponent could not demand their inclusion. That much is correct – such a rule would be untenable – but the failing is with the *Dow* opinion itself, not with Plaintiffs' interpretation of it.

This is exactly why most courts, apart from the handful of cases on which Ruhrgas originally relied, have rejected the *Dow* approach and have refused to permit third-parties to join a contractually agreed-upon arbitration even if they later consent. *E.g.*, *Britton v. Co-op Banking Group*, 4 F.3d 742 (9th Cir. 1993). European commentators have read *Dow* exactly as the Plaintiffs have – only to permit the party seeking arbitration to join its affiliates where they consent. Predictably, they also have criticized the opinion as unsound.

Any move toward permitting the joinder of claimants more easily than defendants is unfortunate. The parties should, wherever possible, know, from the time the contract is made, who may be involved in an arbitration, so as to raise any objections that they may have to the participation of that party at the earliest possible stage. It is rather objectionable that a company may or may not be bound by the arbitral clause depending on whether he is a claimant or a respondent.

Adam Samuel, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, U.S. and West German Law* 103 (Zurich 1989) (attached).

2. Even properly read, *Dow* does not reflect a generally accepted international rule.

Not only does a proper reading of *Dow* reveal that it is inapposite, contrary to Ruhrgas' "reference-to-the-ICC" argument, the decision hardly reflects the European arbitration zeitgeist. In fact, *Dow* has been roundly rejected in Europe even in connection with a claimant's attempt to join willing corporate affiliates. As Samuel explains, "A more fundamental objection applies to the reasoning in the *Dow Chemicals* case, regardless of the position of the party sought to be joined. Neither the arbitral tribunal nor the French court, which upheld the former's decision, laid down any clear guidelines by which one could predict in advance if and how many companies a group will be made parties to an arbitral agreement signed by a member of the conglomerate." *Id.* at 104. "A more satisfactory approach can be found in a recent French Cour de cassation decision and a Swiss ICC award in which applications to join the beneficiary of the contract and the non-signatory members of the respondent's group of companies were rejected." *Id.* (emphasis added). Citing a U.S. district court decision, Samuel points out that companies are quite able to include as parties all members of a so-called group where that is their intention. *Id.* n.150 (citing *Dighello v. Busconi*, 673 F. Supp. 85, 88 (D. Conn. 1987)).

B. Talbott Bigfoot (note)

The parties have briefed the *Talbott Big Foot* dicta *ad nauseum*, and Plaintiffs will resist the urge to delve into those issues further. The case speaks for itself, and its working cannot be tortured into providing authority for

the untenable proposition that one who never has agreed to arbitrate his claims can be compelled to do so. Ruhrgas' contention that *Astron* somehow supports the notion of free wheeling "privity" among corporate affiliates is erroneous. While the *Astron* opinion's curt analysis left much to be desired, subsequent decisions applying *Astron* have confirmed that there must be a showing of alter ego for those principles to apply. *E.g.*, *Dudley v. Smith*, 504 F.2d 979, 982 (5th Cir. 1974); *Hart v. Yamaha-Parts Distrib., Inc.*, 787 F.2d 1468, 1472 (11th Cir. 1986) (applying *Astron* and Fifth Circuit law). There is no such issue here.

II. THE FRAUDULENT JOINDER ISSUE

Ruhrgas' continuing argument that Norge was fraudulently joined is demonstrably wrong and should be rejected. No one disputes that Norge owns legal title to the Heimdal field's production license. In its Surreply, Ruhrgas points to Amendment 2 to the Heimdal Joint Operating Agreement⁴ as evidence that MPCN now has "all rights and benefits" attributable to Norges' interest in the field. If that were the case, however, then there would be no reason for the Heimdal partners ever to recognize Norge's interest in the field following Amendment 2's execution. Nevertheless, Amendment 3 to the Joint Operating Agreement unmistakably refers to *Norge's* partnership

⁴ See Exhibit 59 to Ruhrgas' Response to Motion to Remand.

interest – thereby confirming that Norge has a "real" interest in the field.⁵

Ruhrgas' assertion that Norge possibly may never exercise its reversionary rights seems intentionally misleading. Although Finn Engzelius testified in December, 1995, that the date of any such reversion was uncertain, he *never* testified that such a reversion would *not* occur. Indeed, while the eventual termination of the Pass Through seemed clear from the outset, much has happened since Mr. Engzelius was deposed. For instance, the Heimdal partners have been informed that MPCN no longer will sell gas after its agreement with the Consortium terminates in June, 1996,⁶ and the Heimdal field's operator has advised MPCN that such conduct will constitute a default of its obligations.⁷ Accordingly, after June 11, 1996, MPCN will be in default under the Pass Through Agreements because it no longer will be performing its obligations under the Joint Operating Agreement. Norge previously has alleged that it will terminate the Pass Through Agreements upon MPCN's default⁸ – thus, in addition to Norge's other rights, actual reversion of the rights previously assigned to MPCN is imminent.⁹

⁵ A copy of Amendment 3, which naturally post-dates Amendment 2, is attached as the last two pages of Exhibit 1 to Plaintiff's Reply Brief in Support of their Motion to Remand.

⁶ See Exhibit 6 to Plaintiff's Reply Brief in Support of their Motion to Remand.

⁷ See Exhibit "B" attached hereto.

⁸ See Plaintiff's Reply Brief in Support of their Motion to Remand at 24.

⁹ The February 12, 1996 letter attached as Exhibit C to Ruhrgas' Surreply does not imply otherwise. All that letter

To say that Norge is not a real party in interest under these circumstances is to ignore the reality Ruhrgas' actions have created.

Of course, the certainty of Norge's reversion is irrelevant to the remand issue to some degree. Despite Ruhrgas' citation to a 1961 Connecticut case to the contrary, numerous cases have held that bare legal title alone is sufficient to make one a real party in interest.¹⁰ It is undisputed that Norge owns legal title to the Heimdal Production License, and its claims in this case concern damages Ruhrgas has caused to that interest. Furthermore, Norge clearly has a cause of action for Ruhrgas' participation in Statoil's breach of fiduciary duty to Norge.¹¹ Thus, for all the smoke Ruhrgas continues to

indicates is that MPCN was hoping to continue gas sales if Ruhrgas would enable it to deliver gas to other buyers. Ruhrgas refused. The February 26, 1996 default notice (attached hereto as Exhibit B) post-dates that letter, and proves that reversion is about to occur.

¹⁰ See *Bergkamp v. New York Guardian Mortg. Corp.*, 667 F. Supp. 719, 724 (D. Mont. 1987) (holder of "bare legal title" is an "indispensable party"); *Protection Sprinkler Co. v. Lou Charno Studio, Inc.*, 888 S.W.2d 422, 424 (Mo. App. 1994) (assignee of claim). Further, Norge's rights in the field are governed by Norwegian legislation requiring its permanent participation in the field. If any parallel to U.S. property law is appropriate, it is to the interest of a patent holder, who remains a proper party notwithstanding an assignment, complete or partial, of rights under the patent. *E.g.*, *Pipeliners, Inc. v. American Pipe & Plastics, Inc.*, 893 F. Supp. 704, 705 (S.D. Tex. 1995); *Pfizer, Inc. v. Elan Pharmaceutical Research Corp.*, 812 F. Supp. 1352, 1356 (D. Del. 1993).

¹¹ See Plaintiffs' Reply Brief in Support of their Motion to Remand at 17-18. In its Surreply, Ruhrgas' failed to respond to this rather obvious flaw in its logic.

blow, it has not met its burden of proving that Norge was fraudulently joined in this case.

III. INTERNATIONAL ISSUES

Despite Ruhrgas' undisputed close ties to its own government, it cannot create a federal question simply by convincing the German government to file a brief in this case. The second section of Article III of the Constitution spells out the federal courts' subject matter jurisdiction in exacting detail. There is no general federal common law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

To be sure, a handful of cases have been decided in which the plaintiff's claims have "arisen" under international law and have thus fallen within the limited original jurisdiction of the federal courts, or the even more restricted removal jurisdiction. The key to these cases, however, is the claim presented in the plaintiffs' petition. Where the plaintiff claims that the acts of a hostile foreign government should be recognized by the United States or that title to property in foreign lands should be resolved, federal common law has been created and otherwise applicable to state law has been preempted. *E.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). But a private damage action between corporations does *not* arise under the federal common law by virtue of the fact that the corporations are citizens of different countries. Nor is such a claim transformed into a claim arising under federal common law by virtue of one litigant obtaining the assistance of its own government. The Fifth Circuit made this point abundantly clear in *Aquafaith Shipping, Ltd. v. Jarillas*, 963 F.2d 806, 809 (5th Cir. 1982)

(stressing that focus is on plaintiff's petition and finding no basis for "international issue" jurisdiction despite the presence of foreign corporate defendants).

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this document was served on Defendant's attorneys of record in accordance with Federal Rule of Civil Procedure 5, on March 19, 1996.

/s/

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY,)	
MARATHON INTERNATIONAL)	
OIL COMPANY, AND)	
MARATHON PETROLEUM	)	CIVIL ACTION
NORGE A/S,	)	NO. H-95-4176
)	
Plaintiffs,)	
)	
vs.)	
)	
RUHRGAS, A.G.,)	
)	
Defendant.)	

MEMORANDUM AND ORDER

(Filed Mar. 29, 1996)

Pending before the Court in the above styled case are:

- (1) Ruhrgas, A.G.'s ("Ruhrgas") Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(2) (Instrument #4) for lack of personal jurisdiction;
- (2) Ruhrgas's Motion to Dismiss on *Forum Non Conveniens* Grounds (Instrument #8).
- (3) plaintiffs Marathon Oil Company ("Marathon"), Marathon International Oil Company ("MIOC"), and Marathon Petroleum Norge A/S's ("Norge") Motion to Remand (Instrument #12); and
- (4) Ruhrgas's Motion for Reconsideration of Order Denying Motion for Stay Pending Arbitration, or in the Alternative, To Vacate and

Defer Ruling Pending Discovery (Instrument #39).

The parties have performed discovery on these jurisdictional motions and have had the opportunity to fully brief the issues. Additionally, the Federal Republic of Germany has filed an Amicus Brief in Support of Ruhrgas (Instrument #58). Although the amicus brief at best only reasserts Ruhrgas's arguments, the plaintiffs have filed a response to the brief. After considering the parties' submissions, the record in the case, and the relevant law, the Court concludes that Ruhrgas's motion to reconsider the motion to compel arbitration should be denied, Ruhrgas's notion [sic] to dismiss for lack of personal jurisdiction should be granted, this case should be dismissed, and the plaintiffs' motion to remand and Ruhrgas's motion to dismiss for *forum non conveniens* should be denied as moot.

I. Factual Background

The basis of the case is the development of the natural gas, Heimdal Field ("the field"), located in the Norwegian North Sea. The plaintiffs' affiliate, Marathon Petroleum Company (Norway) ("MPCN") entered into an agreement with Ruhrgas to sell its share of the gas from the field to Ruhrgas. The plaintiffs maintain that Ruhrgas and non-party Statoil conspired to have MPCN and the plaintiffs pay for the development of the field and then lock MPCN into the agreement, which was not profitable. The plaintiffs claim that they have suffered losses due to the loans they made to MPCN as a result of Ruhrgas's conduct. The plaintiffs contend that Ruhrgas, by its

actions with non-party Statoil, is liable to the plaintiffs for fraud, tortious interference with prospective business relationships, participation in breach of fiduciary duty, constructive fraud, and civil conspiracy.

II. Arbitration of Claims

It is undisputed that the agreement between MPCN and Ruhrgas contains an arbitration clause. The arbitration clause provides in pertinent part that:

All claims, disputes and other matters arising out of or relating to this Agreement which the Parties are unable to resolve by mutual agreement . . . shall exclusively and finally be settled by arbitration in Stockholm, Sweden. . . .

Heimdal Gas Sales Agreement at article 15 (Instrument #1, Exhibit B, Exhibit 2 (filed under seal as Instrument #3)). With respect to the instant motion, the main dispute is whether the arbitration clause is binding on the plaintiffs, who admittedly did not sign the agreement.

Ruhrgas contends that this case should be stayed pending arbitration pursuant to sections 1 and 3 of Article II of the Convention on the Recognition and Enforcement of foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C. § 201 note (West Supp. 1995) ("the Convention") and 9 U.S.C. §§ 3 and 208. The Fifth Circuit has held that the Convention contemplates a very limited inquiry by courts when considering a motion to compel arbitration:

(1) is there an agreement in writing to arbitrate the dispute; in other words, is the arbitration agreement broad or narrow;

(2) does the agreement provide for arbitration in the territory of a Convention signatory;

(3) does the agreement to arbitrate arise out of a commercial legal relationship; and

(4) is a party to the agreement not an American citizen?

Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1144-45 (5th Cir. 1985) (citing *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 185-86 (1st Cir. 1982)). The parties must concede that Sweden is a signatory to the Convention, the dispute arises out of a commercial legal relationship, and Ruhrgas is not an American citizen. The only requirement that is not clearly present is whether there is an agreement in writing to arbitrate the dispute.

Ruhrgas filed its initial Motion for Stay Pending Arbitration (Instrument #6) on August 28, 1995. On November 15, 1995, the Court issued an eleven page Memorandum and Order (Instrument #38) which denied Ruhrgas's motion for stay pending arbitration because it was not established that there was a written agreement whereby the plaintiffs had consented to arbitration with Ruhrgas. Soon after the denial of the motion for stay, Ruhrgas filed a Motion for Reconsideration of Order Denying Motion for Stay Pending Arbitration, or in the Alternative, To Vacate and Defer Ruling Pending Discovery (Instrument #39). In its motion to reconsider, Ruhrgas contends that the plaintiffs should be compelled to arbitration based on the virtual representation doctrine and on the "group of companies" doctrine which has been applied in France.

A. Virtual Representation Doctrine

Ruhrgas maintains that the Fifth Circuit's opinion in *Astron Indus. Assocs., Inc. v. Chrysler Motors Corp.*, 405 F.2d 958 (5th Cir. 1968), requires that this case be stayed pending arbitration. In the Memorandum and Order denying Ruhrgas's initial motion for stay, the Court rejected Ruhrgas's virtual representation argument on the basis that the plaintiffs' claims against Ruhrgas are independent of any contract claims which MPCN might have against Ruhrgas. Instrument #38 at 8-10. The relationships between the companies involved in *Astron* are similar to those in the instant case. Transcontinental Industries, Inc. had a contractual relationship with Chrysler Motors Corporation to provide parts and supplies for Chrysler. Astron Industrial Associates, Inc. acquired Transcontinental relying in large part on Transcontinental's relationship with Chrysler. Astron felt Chrysler had breached the contract with Transcontinental and authorized its legal counsel to initiate two separate lawsuits against Chrysler on behalf of each company, Transcontinental and Astron. Transcontinental ended up in bankruptcy proceedings and eventually had its suit against Chrysler dismissed with prejudice. Chrysler then sought to have the suit by Astron dismissed on the basis of *res judicata*. On appeal, the Fifth Circuit concluded that the Transcontinental and Astron lawsuits were "identical for purposes of *res judicata*. In both suits the only wrong which Chrysler allegedly committed was its failure to supply automobile parts and supplies to Transcontinental." *Astron*, 405 F.2d at 962. "Whether the theory of

recovery be misrepresentation to Transcontinental, misrepresentation to Astron, breach of contract with Transcontinental, or breach of contract with Astron, the operative wrong remains the same, the evidence necessary to sustain the allegations is the same, and a different judgment in this suit would impair rights under the earlier dismissal." *Id.* Since the two lawsuits involved the same wrong by Chrysler and were being pursued by the two related companies, the Fifth Circuit determined that the dismissal of Transcontinental's suit barred Astron from pursuing its suit. *Id.*

Ruhrgas believes that *Astron* applies to the instant case because the plaintiffs' claims allege a wrong which is the same wrong which MPCN could assert against Ruhrgas in arbitration. The Court does not necessarily agree with Ruhrgas's belief that there is only "one wrong" allegedly committed by Ruhrgas. The claims that the plaintiffs have asserted are for alleged acts of misrepresentation by Ruhrgas that induced the plaintiffs to invest money in MPCN. The claims which MPCN could assert against Ruhrgas would deal with whether Ruhrgas breached the contract between them. Assuming, *arguendo* however, that Ruhrgas has committed only one wrong with respect to the plaintiffs and MPCN, Ruhrgas's argument regarding the virtual representation doctrine is that the plaintiffs have so much control over MPCN that the plaintiffs are in privity with MPCN under the virtual representation doctrine.

Ruhrgas has provided evidence which shows that in negotiations and dealings between MPCN and Ruhrgas, MPCN was represented by individuals who were also employees of the plaintiffs. Even if the Court agreed with

Ruhrigas's argument that there is only one wrong and the plaintiffs and MPCN are in privity, Ruhrigas's case for arbitration relies on a footnote in *In re Talbott Big Foot, Inc.*, 887 F.2d 611 (5th Cir. 1989). In *In re Talbott*, the Fifth Circuit noted that whether a nonsignatory to an arbitration agreement could be compelled to arbitrate would be a closer question if the nonsignatory and signatory were in privity so that an arbitration award would have a preclusive effect against the nonsignatory. *Id.* at 614 n.4. However, *In re Talbott* involved a situation of whether a nonsignatory's action should be stayed pending the resolution of a related arbitration which might have a preclusive effect on the litigation. Thus, even *In re Talbott* does not necessarily apply in this case because MPCN has not initiated arbitration proceedings against Ruhrigas.

This situation may certainly be discouraging to Ruhrigas since the plaintiffs and MPCN might very likely have made a conscious decision that MPCN would not pursue any claims against Ruhrigas, but there would be nothing improper about the plaintiffs doing so. The virtual representation doctrine has no application to this case and the plaintiffs are not bound by MPCN's arbitration clause on that basis.

B. Group of Companies Doctrine

Ruhrigas next argues that the plaintiffs should be bound by the arbitration clause to which MPCN agreed to based on the "group of companies" theory. This theory comes from *Dow Chemical v. Isover Saint Gobain*, Cour d'

Appel, Paris, 21 October 1983, 110 J. 899 (1983) IX Yearbook 131 (1984) (English translation) (a copy of the opinion is attached to Instrument #39 as Exhibit 1 to Exhibit A), an opinion by a French arbitration panel. In *Dow Chemical*, two Dow subsidiaries had agreements with Isover which provided for arbitration. The issue resolved in *Dow Chemical* was whether the parent company, Dow Chemical (USA) and another subsidiary, Dow Chemical France, could also require that their claims against Isover be arbitrated as well. The French panel concluded that, in view of the major roles that Dow Chemical (USA) and Dow Chemical France played in executing the agreements with Isover, the arbitration agreement could be enforced by them. The panel stated that, "Considering that irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality . . . of which the arbitral tribunal should take account when it rules on its own jurisdiction. . . ." *Id.* at 136. Ruhrigas urges this Court to adopt the group of companies doctrine from *Dow Chemical* and hold that the plaintiffs in the instant case are bound by the arbitration clause executed by MPCN.

Obviously, the *Dow Chemical* opinion has no binding precedential value on this Court. Additionally, *Dow Chemical* does not squarely apply to this case. The French panel went on to state that, "Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to

have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise." *Id.* (emphasis added). In the instant case, although the plaintiffs may have played a significant role in the negotiations of the contract between Ruhrgas and MPCN, it is certainly not clear that all the parties (the plaintiffs, MPCN, and Ruhrgas) intended to be bound by the arbitration clause between MPCN and Ruhrgas. Another important distinction between *Dow Chemical* and the instant case is that Dow Chemical (USA) and Dow Chemical France were trying to compel arbitration with a party which had agreed to arbitration with at least some related entity. In the instant case, however, Ruhrgas seeks to compel arbitration with the plaintiffs even though they have never consented to arbitration with Ruhrgas or any member of its group.

The Court declines to find that the plaintiffs should be compelled to arbitrate their claims with Ruhrgas based on the group of companies doctrine. Having rejected Ruhrgas's arguments in its motion for reconsideration of its motion for stay, the Court concludes that its denial of Ruhrgas's motion for stay pending arbitration was proper and the motion for reconsideration should be denied.

III. Discretion to Rule on Pending Jurisdictional Motions

In the Scheduling Conference held before United States Magistrate Judge Frances H. Stacy on November 6, 1995, each side of this case argued that the Court should rule on its respective jurisdictional motions without ruling on the motions of the other. In other words, the

plaintiffs desired to have the Court grant their motion to remand without ruling on Ruhrgas's motions to dismiss. Ruhrgas, on the other hand, desired to have the Court rule on the arbitration issue and/or the motions to dismiss for lack of personal jurisdiction and *forum non conveniens* before ruling on the motion to remand. At this point, the Court is faced with choosing first to rule on the plaintiffs' motion to remand, Ruhrgas's motion to dismiss for lack of personal jurisdiction, or Ruhrgas's motion to dismiss for *forum non conveniens*.

In the Fifth Circuit, the law is well settled that district courts have the power to rule on motions challenging personal jurisdiction before reaching motions to remand. *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1494 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 690 (1994). Judicial economy is served by the exercise of this power because if the district court remands the case, it has merely avoided ruling on a motion that will fall to the state court to decide. *Id.* Furthermore, it is often necessary for district to address the issue of personal jurisdiction regardless of which motion it addresses first. *Id.* The Court will first discuss Ruhrgas's motion to dismiss for lack of personal jurisdiction because the conclusion that personal jurisdiction does not exist over Ruhrgas is dispositive of the remaining motions and the case.

IV. Motion to Dismiss for Lack of Personal Jurisdiction

Pursuant to Fed. R. Civ. P. 12(b)(2), Ruhrgas moves to have the claims against it dismissed. When a defendant challenges personal jurisdiction, the plaintiffs have the

burden to prove that the Court has jurisdiction over the defendant. *Colwell Realty Invs., Inc. v. Triple T. Inns of Arizona, Inc.*, 785 F.2d 1330, 1332 (5th Cir. 1986). The plaintiffs must establish by *prima facie* evidence that personal jurisdiction exists over Ruhrgas. *Union Carbide Corp. v. UGI Corp.*, 731 F.2d 1186, 1189 (5th Cir. 1984). The Court may exercise personal jurisdiction over a non-resident defendant only if (1) the defendant is subject to service of process under the forum state's long-arm statute and (2) the exercise of jurisdiction comports with the due process requirements of the Fourteenth Amendment. *Colwell Realty*, 785 F.2d at 1333. Because the Texas long-arm statute, Tex. Civ. Prac. & Rem. Code § 17.042, "reaches as far as the federal constitutional requirements of due process will permit," the Court need only determine whether the exercise of personal jurisdiction over Ruhrgas satisfies the United States Constitution's due process requirements. *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 200 (Tex. 1985).

The due process clause of the Fourteenth Amendment, as interpreted by the Supreme Court, permits the exercise of personal jurisdiction over a nonresident defendant when (1) that defendant has established "minimum contacts" with the forum state; and (2) the exercise of jurisdiction over that defendant does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

The minimum contacts prong of the test may give rise to either "specific" or "general" jurisdiction. *WNS, Inc. v. Farrow*, 884 F.2d 200, 202 (5th Cir. 1989). When the act or transaction being sued upon is unrelated to the nonresident defendant's contacts with the forum state,

personal jurisdiction does not exist unless the defendant has sufficient "continuous and systematic contacts" with the forum state to support "general jurisdiction," but a single act by a nonresident defendant directed at the forum state can be enough to confer personal jurisdiction by "specific jurisdiction" if that act gives rise to the claim being asserted. *Ham v. La Cienega Music Co.*, 4 F.3d 413, 415-16 (5th Cir. 1993) (citing *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984)).

The minimum contacts prong, for specific jurisdiction purposes, is satisfied by actions, or merely a single act, by which the nonresident defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Specific jurisdiction exists over a nonresident defendant only if the nonresident defendant: (1) purposefully directed his activities at the residents of the forum state, *Asahi Metal Ind. Co. v. Superior Court of Cal.*, 480 U.S. 102, 109-22 (1987), and (2) the plaintiff's claims arise out of or relate to the defendant's purposeful contact with the forum. *Burger King*, 471 U.S. at 472. The nonresident's "purposeful availment" must be such that the defendant "should reasonably anticipate being haled into court" in the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

But even if minimum contacts exist, the exercise of personal jurisdiction over a nonresident defendant will fail to satisfy due process requirements if the assertion of jurisdiction offends "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316. In determining this fundamental fairness issue, courts are to

examine (1) the defendant's burden; (2) the forum state's interest; (3) the plaintiffs' interest in convenient and effective relief; (4) the judicial system's interest in effective resolution of controversies; and (5) the state's shared interests in furthering fundamental social policies. *Asahi Metal*, 480 U.S. at 112.

In this case, the plaintiffs contend that Ruhrgas is subject to both specific jurisdiction and general jurisdiction. Expectedly, Ruhrgas argues that it is not subject to personal jurisdiction on either basis. The Court will consider each basis of personal jurisdiction *seriatim*.

A. Specific Jurisdiction

For the exercise of specific jurisdiction over a nonresident defendant to be proper, the nonresident defendant must have purposefully availed itself of the privilege of conducting activities within Texas, thus invoking the benefits and protections of its laws. *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 777 (5th Cir. 1986), *cert. denied*, 481 U.S. 1015 (1987). As stated above, specific jurisdiction exists over a nonresident defendant only if the nonresident defendant: (1) purposefully directed his activities at the residents of the forum state, *Asahi Metal*, 480 U.S. at 109-22, and (2) the plaintiff's claims arise out of or are directly related to the defendant's purposeful contact with the forum. *Wilson v. Belin*, 20 F.3d 644, 647 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 322 (1994) (citing *Helicopteros*, 466 U.S. at 414 n.8). The plaintiffs have failed to satisfy either of the prerequisites for the exercise specific jurisdiction over Ruhrgas.

The plaintiffs maintain that Ruhrgas is subject to specific jurisdiction in Texas due to Ruhrgas's attendance at three meetings in Houston concerning the Heimdal Field. The meetings occurred in February 1987, November 1989, and April 1990. Each of these meetings concerned the sales contract between Ruhrgas and MPCN. Bossley Deposition (Instrument #65, Exhibit 2) at 45, 48-49, 52-53, 58-60. The plaintiffs' claims concern misrepresentations and fraudulent conduct by Ruhrgas and Statoil which caused the plaintiffs to suffer losses by continuing to supply funds to MPCN. The plaintiffs' designated representative who attended all three of the Houston meetings, Mr. Burton Bossley, was unable to recall any discussion at the Houston meetings concerning the funding arrangement between the plaintiff's and MPCN. Bossley Deposition (Instrument #65, Exhibit 2) at 62-64. There is no evidence that Ruhrgas's alleged tortious conduct was aimed at Texas or that the brunt of any injury would be felt in Texas. Mr. Bossley was not even able to recall any false statements made by Ruhrgas at the Houston meetings. Bossley Deposition (Instrument #65, Exhibit 2) at 61-62.

The Court is to examine the relationship between Ruhrgas, the forum, and the litigation to determine whether jurisdiction is appropriate. *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772 (5th Cir. 1988) (citing *Holt Oil & Gas*, 801 F.2d at 777)). In view of the nature of the plaintiffs' claims and Ruhrgas's contact with Texas, the Court concludes that the exercise of specific jurisdiction over Ruhrgas would not be proper. *Southmark Corp.*, 851 F.2d at 772. Additionally, Ruhrgas's presence in Texas was related to negotiations under the contract between

Ruhrgas and MPCN. Since the contract between Ruhrgas and MPCN provided for arbitration in Sweden, Ruhrgas could not have expected to be haled into Texas courts based on these meetings. The Court is aware that the personnel for MPCN who attended the meetings in Houston with Ruhrgas wore "several hats" (i.e., the same individuals who represented MPCN also represented other Marathon entities at the same time), and Ruhrgas was possibly aware of the situation. Since there is no evidence that Ruhrgas engaged in any tortious conduct in Texas, however, Ruhrgas is not subject to specific jurisdiction based on MPCN's representatives wearing other entities' hats because Ruhrgas was in Houston due to the contract with MPCN and could only expect to have to engage in arbitration in Sweden.

B. General Jurisdiction

For a court to exercise general jurisdiction over a nonresident defendant, the defendant must have contacts with the forum state which are continuous, systematic, and substantial. *Wilson*, 20 F.3d at 649 (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 n.11 (1984)). *Perkins* is the only case in which the Supreme Court has upheld the finding of general jurisdiction. *Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.*, 1 F.3d 848, 851 n.3 (9th Cir. 1993). "The leading Supreme Court case on general jurisdiction is *Helicopteros*. . . ." *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 181 (5th Cir. 1992), cert. denied, 506 U.S. 1080 (1993). In order to determine whether Ruhrgas's contacts constitute the kind of continuous and systematic general business contacts to support

general jurisdiction, the Court must explore the nature of Ruhrgas's contacts with Texas. *Helicopteros*, 466 U.S. at 415-16.

The plaintiffs contend that Ruhrgas is subject to general jurisdiction based on the following contacts with Texas. In 1994, Ruhrgas acquired a twenty percent share of Houston based Tenneco Energy Resources Corporation ("TERC") for \$47 million. Instrument #63, Exhibit 11. The purchase of the TERC stock was negotiated in Houston. Benke Deposition (Instrument #63, Exhibit 12) at 41. Ruhrgas has one member on the five member board of directors of TERC. *Id.* at 7. The Ruhrgas board member and two other Ruhrgas officials travel to Houston three times each year for TERC's board meetings. Benke Affidavit (Instrument #5, Exhibit D) These individuals from Ruhrgas also attend about nine other meetings per year in Houston in relation to TERC which appear to have occurred on combined trips. Instrument #63, Exhibit 12 at 15, 65-67, 69-70. Ruhrgas personnel have possibly traveled to Texas for meetings with various US oil companies. *Id.* at 77-78. Ruhrgas maintains an employee training program with TERC wherein young low-level Ruhrgas employees are temporarily assigned to work in Houston for TERC under TERC's direction. Falkenhausen Deposition (Instrument #63, Exhibit 21). These employees are generally paid by TERC, unless the assignment to TERC is for less than a year, in which case Ruhrgas continues to pay them. *Id.* at 19. While the employees are assigned to TERC, Ruhrgas pays them overseas bonuses and salary differentials, subsidizes Houston housing expenses, and subsidizes the employees' children's educational

expenses in Houston. *Id.* at 15, 19, 20, 21, 26. The plaintiffs also point out that while the Ruhrgas employees are assigned to TERC, they are considered to simultaneously be employees of Ruhrgas. Instrument #63, Exhibit 25. The plaintiffs have provided a summary of Ruhrgas's purchase orders from April 1983 through October 1995 which reveal about one million dollars in purchases in Texas during the last twelve years. Instrument #63, Exhibit 26. Additionally, it appears that Ruhrgas has paid over \$700,000 to a Dallas based firm for reservoir evaluation services over the last twenty years. Instrument #63, Exhibit 27. Based on these contacts with Texas, the plaintiffs maintain that Ruhrgas has systematic and continuous contacts with Texas that will support general jurisdiction over Ruhrgas.

With respect to Ruhrgas's stock ownership of TERC and its participation in TERC related activities, it is settled that even complete stock ownership and common officers and directors are not sufficient to attribute the contacts of one entity to another. *Dunn v. A/S Em. Z Svitzer*, 885 F.Supp. 980, 987 (S.D.Tex. 1995) (citing *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1987)). Therefore, Ruhrgas's ownership interest in TERC is not a factor in determining continuous and systematic contacts in Texas. With respect to Ruhrgas's employees that are assigned to TERC, the Fourth Circuit in *Ratliff v. Cooper Lab., Inc.*, 444 F.2d 745 (4th Cir.), *cert. denied*, 404 U.S. 948 (1971), held that general jurisdiction did not exist over a nonresident defendant in spite of the defendant having five salesmen living in the forum state who promoted the defendant's products to customers in the forum state. In the instant case, the Ruhrgas employees

that are assigned to work in Houston are not doing work for Ruhrgas. They are working for TERC on TERC projects. The Court concludes that the presence of the Ruhrgas employees in Houston provides an even less compelling basis to support general jurisdiction over Ruhrgas than did the salesmen in *Ratliff*.

The remaining contacts that Ruhrgas has with Texas (*i.e.*, training sessions and purchases in Texas) do not support general jurisdiction based on *Helicopteros*. Similar contacts with Texas were found to be insufficient to support general jurisdiction in *Helicopteros*. *Helicopteros* was a wrongful death case brought in Texas state court against *Helicopteros*, a Colombian corporation, after a helicopter crash in Peru. The Supreme Court held that *Helicopteros* was not subject to general jurisdiction in Texas in spite of (1) its CEO having attended a meeting in Texas; (2) its having accepted checks drawn on a Texas bank; (3) its employees attending training sessions in Texas; and (4) its having made four million dollars in purchases from a Texas business during a seven year period. Ruhrgas's attending meetings in Texas and purchasing less than two million dollars in products and services from Texas businesses falls short of the level of contacts that *Helicopteros* had with Texas which the Supreme Court held were insufficient to establish general jurisdiction. Therefore, Ruhrgas has not had systematic and continuous contacts with Texas which subject it to general jurisdiction in Texas.

Because the Court has concluded that there is no general or specific jurisdiction over Ruhrgas, the Court need not consider whether the exercise of jurisdiction

over Ruhrgas would comport with traditional notions of fair play and substantial justice.

V. Conclusion

In accordance with the foregoing, the Court hereby

ORDERS that Ruhrgas's Motion for Reconsideration of Order Denying Motion for Stay Pending Arbitration, or in the Alternative, To Vacate and Defer Ruling Pending Discovery (Instrument #39) is **DENIED**; and

ORDERS that Ruhrgas's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(2) (Instrument #4) for lack of personal jurisdiction is **GRANTED**.

The Court further

ORDERS that the plaintiffs' Motion to Remand (Instrument #12) and Ruhrgas's Motion to Dismiss on *Forum Non Conveniens* Grounds (Instrument #8) are **DENIED** as moot.

SIGNED at Houston, Texas, this 29th day of March 1996.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

MARATHON OIL COMPANY,)	
MARATHON INTERNATIONAL)	
OIL COMPANY, AND MARATHON)	
PETROLEUM NORGE A/S,)	
Plaintiffs,)	
vs.	)	CIVIL ACTION
RUHRGAS, A.G.,	)	NO. H-95-4176✓
Defendant.)	

ORDER OF DISMISSAL

(Filed Mar. 29, 1996)

In accordance with the Court's Memorandum and Order of this day granting defendant Ruhrgas, A.G.'s motion to dismiss for lack of personal jurisdiction, the Court hereby

ORDERS that this case be **DISMISSED** for lack of personal jurisdiction over defendant Ruhrgas, A.G.; and

ORDERS that Ruhrgas, A.G. shall recover its costs of court.

SIGNED at Houston, Texas, this 29th day of March 1996.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY,	§	
MARATHON INTERNATIONAL	§	
OIL COMPANY, and MARATHON	§	
PETROLEUM NORGE A/S,	§	
Plaintiffs,	§	
	§	CIVIL ACTION
v.	§	NO. H-95-4176
	§	
RUHRGAS, A.G.,	§	
Defendant.	§	

NOTICE OF APPEAL

Plaintiffs Marathon Oil Company, Marathon International Oil Company and Marathon Petroleum Company Norge A/S hereby give notice of their appeal to the United States Court of Appeals for the Fifth Circuit of this Court's Order of Dismissal of March 29, 1996, and its Memorandum and Order entered the same date.

DATED this 4th day of April, 1996.

Respectfully submitted,

/s/ Clifton T. Hutchinson
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CERTIFICATE OF SERVICE

A copy of this document was served on Defendant's attorneys of record in accordance with Federal Rule of Civil Procedure 5, on April 4, 1995.

/s/ David J. Schenck
David J. Schenck

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20361

MARATHON OIL COMPANY;
MARATHON INTERNATIONAL
OIL COMPANY; MARATHON
PETROLEUM NORGE A/S,

Plaintiffs-Appellants
Cross-Appellees,

versus

RUHRGAS, A.G. -
Defendant-Appellee
Cross-Appellant.

Appeal from the United States District Court
For the Southern District of Texas

(Filed Jun. 10, 1997)

Before POLITZ, Chief Judge, WEINER and STEWART,
Circuit Judges.

POLITZ, Chief Judge:

This international commercial dispute involves allegations of fraud, civil conspiracy, and various business torts. Concluding that the district court lacked subject matter jurisdiction, we vacate and remand with instructions.

Background

In 1976 Marathon Oil Company (MOC) became involved in North Sea gas exploration activities when its affiliate, Marathon International Oil (MIO), purchased a European concern holding a North Sea production license.¹ The production license, originally held by Marathon Petroleum Norge (Norge), ultimately gave another affiliate, Marathon Petroleum Norway (MPN), rights to 24% of a gas field in the North Sea known as the Heimdal field.² Another large interest holder in the Heimdal field was Statoil, Norway's state-owned gas company, which had purchased a 40% interest in 1975.

The present litigation arises from alleged oral and written agreements between the Marathon companies, Ruhrgas, A.G., and other European companies regarding the development and production of Heimdal field reserves. Ruhrgas is Germany's primary gas company. According to the Marathon plaintiffs, Ruhrgas, Statoil, and a consortium of other European companies secretly conspired to monopolize the western European gas market by funneling a large portion of North Sea gas reserves through Ruhrgas's production facilities in Germany.

¹ MIO acquired Pan Ocean and its subsidiary, Pan Ocean Norge, which held the North Sea production license. Pan Ocean was later renamed Marathon Petroleum Norway, and Pan Ocean Norge became Marathon Petroleum Norge.

² MPN acquired the production license by virtue of a Pass Through Agreement with its subsidiary, Marathon Petroleum Norge, the original license holder.

The plaintiffs allege that to effectuate this plan Ruhrgas duped them into providing MPN with \$300 million to participate in extensive construction and drilling operations with the false promises of premium prices for MPN's European gas sales and guaranteed pipeline transportation tariffs to help offset the substantial construction investment.³

When it ultimately became apparent that premium prices would not be honored and the scheduled transportation tariffs would not materialize, MOC, MIO, and Norge⁴ sued Ruhrgas in Texas state court for fraud, misrepresentation, civil conspiracy, and tortious interference with business relations. Ruhrgas timely removed, invoking jurisdiction under diversity of citizenship, federal question, and 9 U.S.C. § 205. After removal, Ruhrgas moved for a stay pending arbitration in Europe which the district court denied. Ruhrgas then filed a motion to dismiss for lack of personal jurisdiction and a motion to dismiss for *forum non conveniens*. The Marathon plaintiffs moved to remand for lack of subject matter jurisdiction. The district court granted Ruhrgas's motion to dismiss for lack of personal jurisdiction and dismissed all other

³ This proposal was known as the "Heimdal Gas Agreement," which allegedly guaranteed a \$5.50 per million BTU price. MPN, as assignee of Norge's Heimdal license, was a party to this agreement.

⁴ As a signatory to the Heimdal Gas Agreement, MPN's claims were subject to binding arbitration in Europe. Norge, however, was not a signatory and asserts that although it assigned its Heimdal License to MPN, it nonetheless has standing to sue for the alleged devaluation of the license. We address that contention *infra*.

motions as moot. The court then denied Ruhrgas's motion for reconsideration in which Ruhrgas reurged the court to abate all proceedings pending compelled arbitration in Europe. All parties timely appealed.

Analysis

We address at the threshold the vital question of federal subject matter jurisdiction. As courts of limited jurisdiction, federal courts may adjudicate a case or controversy only if there is both constitutional and statutory authority for federal jurisdiction.⁵ Ruhrgas insists that we must rule on its personal jurisdiction challenge without first determining whether we have jurisdiction *ratione materiae*. We are cognizant that in some instances we have permitted the dismissal of an action for lack of personal jurisdiction without considering the question of subject matter jurisdiction.⁶

We decline, however, to extend those cases into mandatory rules of trial and appellate procedure governing the order in which jurisdictional motions must be determined. No dispositive precedent of our circuit has held

⁵ *Kokkonen v. Guardian Life Ins. Co. of America*, 51 U.S. 375 (1994); *B, Inc. v. Miller Brewing Co.*, 663 F.2d 545 (Former 5th Cir. 1981); Erwin Chemerinski, *Federal Jurisdiction* 217 (1989); see also *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850) (Congress may create lower federal courts and thus has the power to vest them with less than full Article III jurisdiction).

⁶ See, e.g., *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489 (5th Cir. 1993); *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559 (5th Cir. 1993); *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964).

that a court *must* ignore a lack of subject matter jurisdiction when it has before it an easier disposition of a motion to dismiss for lack of personal jurisdiction. Such a rule necessarily would be invalid in light of our constitutional and statutory authority and the overwhelming body of precedent commanding all federal courts to scrutinize assiduously subject matter jurisdiction at each stage of litigation, trial and appellate, and to dismiss cases not properly before us.⁷

We must be ever mindful that any rule or decision allowing a federal court to act without subject matter jurisdiction conflicts irreconcilably with basic principles of federal court authority.⁸ On several occasions we have sounded the caution that "[w]here a federal court proceeds in a matter without first establishing that the dispute is within the province of controversies assigned to it by the Constitution and statute, the federal tribunal

⁷ See, e.g., *Cutler v. Rae*, 7 U.S. (7 How.) 729 (1849); *Mansfield v. Swan*, 111 U.S. 379 (1884); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908); *Mitchell v. Maurer*, 293 U.S. 237 (1934); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Philbrook v. Glodgett*, 421 U.S. 7078 (1975); *Judice v. Vall*, 430 U.S. 327 (1977); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100 (5th Cir. 1981); *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295 (5th Cir. 1985); *Mocklin v. Orleans Levee Dist.*, 877 F.2d 427 (5th Cir. 1989); *Trizec Properties, Inc. v. United States Mineral Prods. Co.*, 974 F.2d 602 (5th Cir. 1992); *Moore v. United States Dept. of Agriculture ex rel. Farmers Home Admin.*, 55 F.3d 991 (5th Cir. 1995).

⁸ See, e.g., *Kokkonen*, 511 U.S. at 377 (holding that the jurisdiction of the federal courts "is not to be expanded by judicial decree") (citing *American Fire & Cas. Co. v. Finn*, 431 U.S. 6 (1951)).

poaches upon the territory of a coordinate judicial system, and its decisions, opinions, and orders are of no effect."⁹ If dismissals for lack of personal jurisdiction were judgments on the merits, decisions allowing that determination in the absence of federal subject matter jurisdiction would have no validity.¹⁰ The appropriate course is to examine for subject matter jurisdiction constantly and, if it is found lacking, to remand to state court if appropriate, or otherwise dismiss.¹¹ Such a course respects the proper balance of federalism. We must, therefore, reject Ruhrgas's invitation to ignore the formidable subject matter jurisdiction issue presented herein and resolve that fundamental issue.

Given the limited nature of federal jurisdiction, there is a strong presumption against same,¹² and "the burden

⁹ *B, Inc.* 663 F.2d at 548; see also *Stafford v. Mobile Oil Corp.*, 945 F.2d 803 (5th Cir. 1991); *Getty Oil Co. v. Insurance Co. of N. Am.*, 841 F.2d 1254 (5th Cir. 1988); *In re Majestic Energy Corp.*, 835 F.2d 87 (5th Cir. 1988); *In re Carter*, 618 F.2d 1093 (5th Cir. 1980).

¹⁰ See *Caterpillar, Inc. v. Lewis*, 117 S.Ct. 467 (1996) (holding that a district court must have subject matter jurisdiction by the time it renders judgment for the judgment to be valid); see also *Weeks v. Fidelity & Cas. Co.*, 218 F.2d 503, 504 (5th Cir. 1955) ("If the refusal to remand was erroneous, the judgment of dismissal was likewise erroneous.") (citing *Ruff v. Gay*, 67 F.2d 684 (5th Cir. 1933), *aff'd*, 292 U.S. 25 (1934)).

¹¹ Confronted with virtually identical facts, in *Ziegler v. Champion Mortgage Co.*, 913 F.2d 220 (5th Cir. 1990), we raised the subject matter jurisdiction question *sua sponte* and vacated the judgment of dismissal which was based on a lack of personal jurisdiction.

¹² Cf. *Leffal v. Dallas Indep. School Dist.*, 28 F.3d 521, 524 (5th Cir. 1994) ("Removal statutes are to be strictly construed against removal.").

of establishing the contrary rests upon the party asserting jurisdiction."¹³ Ruhrgas, as the removing party, has advanced several theories in support of federal jurisdiction. We address each in turn.

A. Diversity of Citizenship

MOC is an Ohio corporation with its principal place of business in Houston, Texas. MIO is a Delaware corporation with its principal place of business in Houston, Texas. Norge is an alien corporation headquartered in Norway. The defendant, Ruhrgas, A.G., is an alien corporation headquartered in Germany.

Norge's status as an alien corporation defeats diversity jurisdiction,¹⁴ unless, as Ruhrgas contends. Norge was fraudulently joined for that very purpose. Among other complaints,¹⁵ Norge contends that Ruhrgas's

¹³ *Kokkonen*, 511 U.S. at 377; see also *Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 804 (5th Cir. 1991) ("The burden of proving that complete diversity exists rests upon the party who seeks to invoke the court's diversity jurisdiction.").

¹⁴ See *Giannakos*, 762 F.2d at 1298 (holding that "[d]iversity does not exist where aliens are on both sides of the litigation").

¹⁵ At the time the parties filed their appellate briefs, Norge did not have the right to market Heimdal gas under the Pass Through Agreement. Briefing indicated that MPN's rights under the Pass Through Agreement would terminate if it failed to perform certain obligations. Norge predicted that such a reversion would occur as a result of Ruhrgas's activities during the summer of 1996. The current status of the Pass Through Agreement therefore is unclear. Terms in the agreement, however, indicate that Norge may have continuing obligations to the nation of Norway under the original production license

monopolization of the western European gas market completely prevents both MPN and itself from marketing Heimdal gas reserves to non-consortium buyers and thereby devalues the production license. Ruhrgas responds that Norge cannot complain of any damage to its production license as Norge assigned all of its interests in the Heimdal license to MPN.

The party attempting to prove fraudulent joinder has a heavy burden.¹⁶ To establish that a defendant has been joined fraudulently, "the removing party must show [by clear and convincing evidence] either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the [nondiverse] defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts."¹⁷ in making this determination, a court must resolve "all disputed questions of fact and all ambiguities in the controlling law in favor of the non-removing party."¹⁸

A close reading of the record and the extensive briefing on fraudulent joinder leave us unconvinced that Norge has been joined fraudulently to defeat diversity jurisdiction. It is not clear what interest Norge possessed

and that Ruhrgas's interference in MPN's activities may be impacting those obligations. Norge also asserts that Ruhrgas has tortiously interfered with MPN's obligations to Norge under the Pass Through Agreement.

¹⁶ *Ford v. Elsbury*, 32 F.3d 931 (5th Cir. 1994).

¹⁷ *B, Inc.*, 663 F.2d at 549 (Footnote omitted).

¹⁸ *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992); see also *Burden v. General Dynamics Corp.*, 60 F.3d 213 (5th Cir. 1995); *B, Inc.*

when granted the production license, nor can we determine with certainty from the record and briefings what interest *vel non* Norge retains after the Pass Through Agreement. Although Norge maintains that it holds legal title to all unproduced reserves, it is apparent that several other possibilities exist for classifying Norge's property interest. Given Texas's choice of law rules Norwegian law likely would have to be consulted to answer these difficult questions.¹⁹ At this stage in the proceedings, however, Ruhrgas shoulders the burden of proof, and it simply cannot prove, by clear and convincing evidence, that Norge has absolutely no possibility of recovering damages under any theory of liability. Diversity jurisdiction, therefore, is not present.

B. Federal Question Jurisdiction

Ruhrgas asserts that federal question jurisdiction is present because the "[p]laintiffs' claims raise substantial

¹⁹ See *Cantu v. Bennett*, 39 Tex. 304 (1873) (indicating that the law of the situs would control the characterization of Norge's property interests); but see *Swanson v. Schlumberger Tech. Corp.* (Tex.App. - Texarkana 1995, writ granted) (indicating that Texas law may control this determination under the "most significant relationship" test). Given the fraudulent joinder standards, we must presume that Norwegian law would apply. Burden. There is, however, no evidence of Norwegian law in the record. Even if we were to attempt to apply Texas law, classification of these various interests and the concomitant rights of Norge to pursue damage remedies would be unclear. This alone precludes a finding of fraudulent joinder. See *Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd.*, 99 F.3d 746 (5th Cir. 1996).

questions of foreign and international relations and questions of customary international law and act-of-state questions which are incorporated into and form a part of the federal common law." The Marathon plaintiffs note that they have alleged only state law causes of action and contend that the well-pleaded complaint rule bars a finding of federal question jurisdiction.

In *Torres v. Southern Peru Copper Corp.*,²⁰ we found federal question jurisdiction based on the federal common law of foreign relations. As in *Torres*, the defendant's government, the Republic of Germany, has filed a letter of protest with the State Department and an amicus brief with the court. The similarities between the two cases end there. Our holding in *Torres* is a very specific application of the well-pleaded complaint rule, under which the complaint must state a cause of action necessarily requiring the "resolution of a substantial question of federal law."²¹ That test was met in *Torres* because the suit itself struck directly at vital economic interests of the nation, and, in deed, at the very sovereignty of the Republic of Peru.

The same cannot be said herein for the Republic of Germany. Its amicus brief focuses primarily on two areas: the enforceability and breadth of European arbitration clauses, and the impact on international trade from allowing suits against European companies to proceed in United States courts. Such concerns, through not insubstantial, would describe many international commercial

²⁰ No. 96-40203, 1997 WL 259649 (5th Cir. May 19, 1997).

²¹ *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983).

disputes between western European corporations and United States corporations and cannot properly form the basis of federal subject matter jurisdiction.

Ruhrigas appears to be an important gas supplier in Germany and western Europe but this action does not strike at the sovereignty of a foreign nation. The plaintiffs' claims do not call into question official German policy decisions and the Republic of Germany was not a participant in the activities giving rise to this suit. This litigation does not seek to impose liability for injuries to foreign citizens occurring solely on foreign soil, as was the situation in *Torres*. Indeed, Ruhrigas allegedly came to the United States and defrauded a United States company on American soil. Merely requiring a German corporation to abide by state law when present here does not *necessarily* implicate substantial foreign relations issues between the United States and Germany. Further, we remain unconvinced that this suit may impact severely the vital economic interests of a highly developed and flourishing industrial nation such as Germany. Federal question jurisdiction does not exist.

C. 9 U.S.C. § 305

Finally, Ruhrigas claims that this case is removable under 9 U.S.C. § 205 because the plaintiff's claims relate to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral

Awards. Notably, MOC, MIO, and Norge were not signatories to any arbitration agreement, nor were they parties to any arbitration proceedings.²²

Under 9 U.S.C. § 205, federal jurisdiction exists if the plaintiffs' claims relate to an arbitration agreement or award falling under the Convention on the Recognition of Foreign Arbitral Awards. An arbitration agreement or award falling under the Convention is one which arises out of an international commercial legal relationship.²³ No one disputes that the plaintiffs' claims arise from international commercial relationships; the issue is whether any *relevant* arbitration agreement exists between the parties to this litigation, a necessary predicate for federal jurisdiction under 9 U.S.C. § 205.²⁴ Simply stated, there is no such agreement.²⁵

Ruhrigas maintains that the Marathon plaintiffs are attempting to enforce provisions of the Heimdal Gas Agreement, an agreement to which they are not parties. It further characterizes this suit as an inappropriate attempt

²² MPN, however, has participated successfully in arbitration proceedings in Europe.

²³ See 9 U.S.C. §§ 205.2.

²⁴ See *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Corp.*, 767 F.2d 1140 (5th Cir. 1995) (holding that the Convention only applies where (1) there is an agreement in writing to arbitrate the dispute; (2) the agreement provides for arbitration in the territory of a convention signatory; (3) the agreement to arbitrate arises from a commercial legal relationship; and (4) a non-American citizen is a party to the agreement).

²⁵ Ruhrigas acknowledges that none of the Marathon plaintiffs have any contractual relationship with Ruhrigas and that none of the plaintiffs ever signed an arbitration agreement.

to circumvent the arbitration agreement under which MPN is bound to arbitrate any disputes concerning the Heimdal Gas Agreement. As such, Ruhrgas contends that the Marathon plaintiffs should be estopped from denying the applicability of the arbitration provisions. We are not persuaded.

MOC and MIO are not seeking redress for wrongs done to MPN. Rather, they allege that Ruhrgas and others jointly participated in a scheme to induce them fraudulently into investing \$300 million into MPN. That Ruhrgas may have effectuated this fraud through its contractual relationship with MPN does not lead to the conclusion that MOC and MIO are seeking damages for harm done to MPN. Further, MOC and MIO are not seeking damages for any breach of contract; they could not do so because no contracts exist between them and Ruhrgas.²⁶ The same is true of Norge's claims. Norge merely claims that Ruhrgas's tortuous conduct has affected the value of its production license and impeded its obligations and rights under the Heimdal license and Pass Through Agreement. Norge is not seeking damages on behalf of MPN, nor has it claimed entitlement to any rights under the Heimdal Gas Agreement.

²⁶ Contrary to Ruhrgas's contention that the Marathon plaintiffs are seeking to enforce the pricing arrangements in the Heimdal Gas Agreement, plaintiffs do not seek injunctive relief. Moreover, the plaintiffs would not be entitled to recover the lost profits of MPN, though such figures may be relative in proving the extent of the plaintiffs' damages.

Finally, Ruhrgas asserts other theories for its thesis that the arbitration provisions in the Heimdal Gas Agreement should apply to all of MPN's corporate affiliates. None is persuasive.

Conclusion

Concluding that the district court lacked subject matter jurisdiction, we vacate the judgment of the district court and remand with instructions that this action be remanded to the 152nd Judicial District Court of Harris County, Texas.

VACATED and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20361

MARATHON OIL COMPANY, MARATHON
INTERNATIONAL OIL COMPANY,
MARATHON PETROLEUM NORGE A/S,

Plaintiffs-Appellants-
Cross-Appellees,

versus

A G RUHRGAS,

Defendant-Appellee-
Cross-Appellant.

Appeals from the United States District Court
for the Southern District of Texas

(Opinion June 10, 1997, 5 Cir., 1997, ___ F.3d ___)

(Filed Nov. 17, 1997)

Before POLITZ, Chief Judge, KING, JOLLY, HIGGIN-
BOTHAM, DAVIS, JONES, SMITH, DUHE,
WIENER, BARKSDALE, EMILIO M. GARZA,
DeMOSS, BENAVIDES, STEWART, PARKER and
DENNIS, Circuit Judges.

BY THE COURT:

A majority of judges in active service having deter-
mined, on the Court's own motion, to rehear this case en
banc,

IT IS ORDERED that this cause shall be reheard by
the Court en banc with oral argument on a date hereafter
to be fixed. The Clerk will specify a briefing schedule for
the filing of supplemental briefs.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20361

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
and

MARATHON PETROLEUM NORGE A/S,

Plaintiffs-Appellants/
Cross-Appellees,

VERSUS

A.G. RUHRGAS,

Defendant-Appellee/
Cross-Appellant.

Appeals from the United States District Court
for the Southern District of Texas

June 22, 1998

Before POLITZ, Chief Judge, KING, JOLLY, HIGGIN-
BOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER,
BARKSDALE, EMILIO M. GARZA, DeMOSS,
BENAVIDES, STEWART, PARKER and DENNIS, Circuit
Judges.

JERRY E. SMITH, Circuit Judge:

Today we decide whether, on removal from a state
court, a district court has discretion to resolve a challenge

to personal jurisdiction before ruling on a legally more difficult question concerning its alleged lack of subject-matter jurisdiction. We conclude that, at least in removed cases, district courts should decide issues of subject-matter jurisdiction first and, only if subject-matter jurisdiction is found to exist, reach issues of personal jurisdiction. Accordingly, we vacate the judgment and remand with instruction to rule on the motion to remand to state court for lack of subject-matter jurisdiction.

I.

Marathon Oil Company, Marathon International Oil Company, and Marathon Petroleum Norge A/S (collectively "Marathon") sued Ruhrgas, a German gas supplier, under various tort theories in Texas state court. The alleged torts arose from Ruhrgas's relationship with Marathon Petroleum Company Norway ("MPCN"), a Marathon affiliate that is the equitable owner of a portion of the Heimdal natural gas field in the North Atlantic. Marathon Petroleum Norge A/S ("Norge"), as a Norwegian company, is required by law to hold legal title to MPCN's interest in the field.

MPCN entered into a sale agreement with Ruhrgas and other gas buyers whereby, for a premium price, the buyers would purchase MPCN's gas from the Heimdal field. This agreement provides that any disputes between MPCN and the buyers will be resolved through arbitration in Sweden.

At some point after the agreement was signed, the price of gas fell, and the buyers, including Ruhrgas, refused to pay MPCN the premium contract price. MPCN

instituted arbitration proceedings in Sweden, whereupon MPCN's affiliates¹ instituted these tort suits against Ruhrgas in Texas state court. They allege that Ruhrgas conspired to monopolize the gas market, tortiously interfered with MPCN's business opportunities, and committed other, similar torts, which had the effect of harming them, as lenders to MPCN.

Ruhrgas removed the case to federal court, asserting diversity jurisdiction under 28 U.S.C. § 1332(a), federal arbitration jurisdiction under 9 U.S.C. § 205, and federal question jurisdiction under 28 U.S.C. § 1331 based on the federal common law of international relations. Ruhrgas moved to dismiss for lack of personal jurisdiction and, in the alternative, requested a stay of proceedings pending arbitration. Marathon moved to remand to state court, asserting a lack of federal subject-matter jurisdiction, and opposed compelled arbitration.

The district court determined that, under the caselaw of this circuit, it had discretion to address personal jurisdiction before reaching the legally more difficult subject-matter jurisdiction issue. Finding personal jurisdiction lacking, the court dismissed the action and otherwise denied Ruhrgas's motion to compel arbitration. Marathon appealed, arguing that, on a motion to remand, the district court should have considered subject-matter jurisdiction before deciding personal jurisdiction.²

¹ Marathon Oil Company owns Marathon International Oil Company, which in turn owns Norge and MPCN. MPCN is not a party to this suit.

² Ruhrgas cross-appealed, contending that it should have been entitled to an order compelling the plaintiffs to arbitrate.

A panel of this court determined that the district court lacked subject-matter jurisdiction, and thus it vacated the dismissal for lack of personal jurisdiction and remanded with instruction to remand to state court. Although acknowledging that "in some instances we have permitted the dismissal of an action for lack of personal jurisdiction without considering the question of subject matter jurisdiction,"³ the panel concluded that "[t]he appropriate course [for a federal court] is to examine for subject matter jurisdiction constantly and, if it is found lacking, to remand to state court if appropriate, or otherwise dismiss."⁴

After the Supreme Court denied certiorari, we granted en banc review.⁵ We now take this opportunity, as an en banc court, to reconcile the conflicting circuit precedent cited by the panel and to explain a district court's obligation concerning which challenge it should decide first when confronted with a removed case in which the existence of subject-matter jurisdiction is questionable and personal jurisdiction is contested. We conclude that the court should proceed to consider the issue of subject-matter jurisdiction (even if that is the more legally difficult issue) before proceeding to address

³ *Marathon Oil Co. v. Ruhrgas, A.G.*, 115 F.3d 315, 318 (5th Cir.) (citing *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489 (5th Cir. 1993); *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559 (5th Cir. 1993); *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964)), *cert. denied*, 118 S.Ct. 413 (1997).

⁴ *Id.* (citing *Ziegler v. Champion Mortgage Co.*, 913 F.2d 228 (5th Cir. 1990)).

⁵ See *Marathon Oil Co. v. Ruhrgas A.G.*, 129 F.3d 746 (1997) (granting rehearing en banc).

whether it (or, for that matter, the state court) would have personal jurisdiction over the protesting defendant.

II.

"[F]ederal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress." *Aldinger v. Howard*, 427 U.S. 1, 15 (1976). The Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. "This language reflects a deliberate compromise[, known as the Madisonian Compromise,] reached at the Constitutional Convention between those who thought that the establishment of lower federal courts should be constitutionally mandatory and those who thought there should be no federal courts at all except for a Supreme Court with, *inter alia*, appellate jurisdiction to review state court judgments." RICHARD H. FALLON, ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 348 (4th ed.1996).

The effect of the compromise is this: "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other [federal] court . . . derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution." *Kline v. Burke Const. Co.*, 260 U.S. 226, 234 (1922). Accordingly, "we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the

federal courts," *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971), because the Constitution leaves Congress the policy choice concerning how far the federal courts' jurisdiction should extend.

Under our federal constitutional scheme, the state courts are assumed to be equally capable of deciding state and federal issues.⁶ To the extent that Congress elects to confer only limited jurisdiction on the federal courts, state courts become the sole vehicle for obtaining initial review of some federal and state claims. *Cf., e.g., Victory Carriers*, 404 U.S. at 212. Where Congress has given the lower federal courts jurisdiction over certain controversies, "[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined." *Id.* (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

The importance of both the lower federal courts' constitutional and statutory subject-matter jurisdiction should not be underestimated. "Because of their unusual nature, and because it would not simply be wrong but indeed would be an unconstitutional invasion of the powers reserved to the states if federal courts were to entertain cases not within their jurisdiction, the rule is well settled that the party seeking to invoke the jurisdiction of a federal court must

⁶ See *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); see also *Robb v. Connolly*, 111 U.S. 624, 637 (1884) (Harlan, J.) ("Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States. . . .").

demonstrate that the case is within the competence of that court." 13 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3522, at 61-62 (2d ed. 1984) (emphasis added).⁷

When a federal court acts outside its statutory subject-matter jurisdiction, it violates the fundamental constitutional precept of limited federal power. See *Oliver v. Trunkline Gas Co.*, 789 F.2d 341, 343 (5th Cir. 1986) (Higginbotham, J.). "Federal courts are courts of limited jurisdiction by origin and design, implementing a basic principle of our system of limited government. In sum, we do not visit a mere technicality upon the parties [by remanding to state court because their case falls outside the jurisdictional statutes]. Rather, we uphold a basic tenet of the American system of diffused political and judicial power." *Id.*

Since the panel issued its opinion, the Supreme Court has reminded us that our jurisdiction must be considered at the outset of a case. This Term, the Court rejected what the Ninth Circuit had labeled the "'doctrine of hypothetical jurisdiction'" – the process of "'assuming' [Article III] jurisdiction for the purpose of deciding the merits" of a case. *Steel Co. v. Citizens for a Better Env't*, 118 S.Ct. 1003, 1012 (1998) (majority opinion) (quoting *United States v. Troescher*, 99 F.3d 933, 934 n.1 (9th Cir. 1996)). The *Steel Co.* Court remarked:

⁷ See, e.g., *Mansfield, C. & L.M. Ry. v. Swan*, 111 U.S. 379, 382 (1884) (stating that "the rule [that a court not act outside its jurisdiction], springing from the nature and limits of the judicial power of the United States, is inflexible and without exception") (emphasis added).

This is essentially the position embraced by several Courts of Appeals, which find it proper to proceed immediately to the merits question, despite jurisdictional objections, at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied. . . .

We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 7 Wall. 506, 514, 19 L. Ed. 264 (1868). . . . The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S. Ct. 510, 28 L. Ed. 462 (1884).

...
 "[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' . . ."
Arizonans for Official English v. Arizona, . . . 117 S.Ct. 1055, 1071 . . . (1997). . . .

Id., at 1012-13.

The rule that we first address our jurisdiction is so fundamental that "we are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977) (citations omitted). "The general rule is that the parties cannot confer on a federal court jurisdiction that has not been vested in that court by the Constitution and Congress. This means that the parties cannot waive lack of [subject-matter] jurisdiction by express consent, or by conduct, or even by estoppel; the subject matter jurisdiction of the federal courts is too basic a concern to the judicial system to be left to the whims and tactical concerns of the litigants." 13 WRIGHT ET AL., *supra*, § 3522, at 66-68 (citations omitted); see, e.g., *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

III.

Ruhrgas does not dispute that a federal district court must determine its jurisdiction before proceeding to the merits of the case. It contests only the proposition that the federal court must reach the issue of *subject-matter* jurisdiction before reaching a challenge to *personal* jurisdiction. Ruhrgas argues that the district court may decide the personal jurisdiction challenge first, because "jurisdiction is jurisdiction is jurisdiction."

Because a federal district court must have both subject-matter jurisdiction over the removed controversy and personal jurisdiction over the defendant, so the argument goes, the court should have discretion to decide the easier

jurisdictional challenge first, to save judicial resources and to avoid tougher legal issues. We find Ruhrgas's advocacy of a discretionary rule in the removal context unpersuasive, as we explain.

A.

Although the personal jurisdiction requirement is a "fundamental principl[e] of jurisprudence," *Wilson v. Seligman*, 144 U.S. 41, 46 (1892), without which a court cannot adjudicate, the requirement of personal jurisdiction, unlike that of subject-matter jurisdiction, "may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue." *Insurance Corp. of Ireland*, 456 U.S. at 704; see also FED. R. CIV. P. 12(h). The defendant's ability to waive the defense arises from the reality that "[t]he requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. . . . It represents a restriction on the judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Insurance Corp. of Ireland*, 456 U.S. at 702; see also *Omni Capital Int'l v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987) (quoting the same).

The Supreme Court has carefully elucidated the distinctions between subject-matter and personal jurisdiction:

Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a

federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. '[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record.' *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884).

None of this is true with respect to personal jurisdiction.

Insurance Corp. of Ireland, 456 U.S. at 702 (emphasis added) (citations omitted). The Court therefore has indicated that "jurisdiction" is not always "jurisdiction." The distinction is that subject-matter jurisdictional requirements prevent our overreaching into the powers that the Constitution and Congress have left to the state courts, while personal jurisdiction requirements prevent both state and federal courts from upsetting the defendant's settled expectations as to where it can reasonably anticipate being sued. See *id.* at 702-04.⁸

⁸ Following oral argument in the instant en banc proceeding, the Supreme Court once again has reminded us of the distinction between restrictions on subject-matter jurisdiction inherent in Article III and those that operate as an external limitation on an Article III court's adjudication. See *Calderon v. Ashmus*, 118 S. Ct. 1694, 1697 n.2 (1998).

The *Steel Co.* majority opinion plainly contemplates Article III jurisdiction in its use of the term "jurisdiction." See *Steel Co.*, 118 S. Ct. at 1013 ("Justice STEVENS' arguments . . . asserting that a court *may* decide the cause of action before resolving Article III jurisdiction – are readily refuted."). Although that case dealt with the easier issue of whether a federal court could pretermitt questions about its subject-matter jurisdiction in order to reach a case's "merits," the teachings of *Steel Co.* – combined with the reasons we discuss in more detail below – counsel against a discretionary rule in the case before us.

B.

A federal court's dismissal for lack of personal jurisdiction affects the state court from which a case was removed in a way that a remand for lack of subject-matter jurisdiction does not. As *Ruhrgas* concedes, dismissal for a lack of personal jurisdiction adjudicates the matter between the parties and is binding on the state court.⁹

It follows that in the removal context, when a federal district court that lacks federal subject-matter jurisdiction dismisses instead for want of personal jurisdiction, it impermissibly wrests that decision from the state courts. This follows from the fact that because, after remand,

⁹ "It has long been the rule that principles of res judicata apply to jurisdictional determinations – both subject matter and personal. See *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *Stoll v. Gottlieb*, 305 U.S. 165 (1938)." *Insurance Corp. of Ireland*, 456 U.S. at 702 n.9; see also *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990) (citing the same).

such a case would have to remain within the state courts, see, e.g., *Healy*, 292 U.S. at 270, questions of personal jurisdiction necessarily would fall within the state courts' exclusive, residual jurisdiction. Those courts are entitled to their own, independent – and absent a controlling Supreme Court decision – even conflicting interpretation of their state's long-arm statute and of the minimum contacts requirements of the federal Due Process Clause.¹⁰

A federal court's decision that it lacks subject-matter jurisdiction, by contrast, returns the case to the state court so that it can adjudicate or dismiss. That decision does not intrude on "[t]he power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts. . . ." *Healy*, 292 U.S. at 270.

Contrary, therefore, to *Ruhrgas*'s statement at oral argument that we are merely "reliev[ing] the state court of the burden of ruling on personal jurisdiction," the discretionary rule threatens the Article III principles of separation of powers and federalism in the context of a removed case. In sum, a federal court can remand a

¹⁰ Cf., e.g., *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("Under [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States."); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 342 (1816) ("It was foreseen, that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognisance of cases arising under the constitution, the laws and treaties of the United States.").

removed case for lack of subject-matter jurisdiction without offending the right and residual power of a state court to adjudicate, or dispose of, that case, but the federal court cannot do the same by assuming that it has subject-matter jurisdiction in order to reach an easier personal jurisdiction issue.¹¹

C.

The usurpation of the state courts' residual jurisdiction to adjudicate the personal jurisdiction question is not the only reason for eschewing a discretionary rule in the removal context. A discretionary rule may also create incentives for defendants to subvert the orderly scheme for removing cases by acting opportunistically.

State-court defendants who face, at the margin of existing precedent, a more plaintiff-friendly due-process/minimum-contacts jurisprudence in state court could, under the discretionary rule, manufacture a convoluted

¹¹ Implicit in Ruhrgas's advocacy of a discretionary rule in the removal context is the notion that a defendant's right of removal is of the same dignity as the plaintiff's choice of forum. "The defendant's right to remove and the plaintiff's right to choose the forum are not equal, [however,] and uncertainties are resolved in favor of remand." 16 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 107.05, at 107-24 through 107-25 & nn. 5, 6 (3d ed. 1997) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104-07 (1941)). This presumption in favor of remand underscores that in the removal context, where the plaintiff chose state court, that court's interest in adjudicating the issue of personal jurisdiction, absent federal subject-matter jurisdiction, must be given special consideration.

theory of federal subject-matter jurisdiction, remove to federal court, and then take advantage of a stricter interpretation of personal-jurisdiction requirements in federal court, to have the case dismissed rather than remanded. The effect may be not only to reward the defendant's manipulation but also to make *our* interpretation of the state long-arm statute, and of the federal minimum contacts analysis, the default for the state courts in this circuit, whereas in the usual course, these state courts would be entitled to have their own interpretation of state and federal law, which would be reviewable only by the state courts and ultimately by the Supreme Court.

D.

We also find the discretionary rule unpersuasive in this case because its justification – judicial efficiency – is less weighty than are other, constitutionally based concerns. A principled discretionary rule also may not be very efficient.

First, our desire for efficiency cannot override separation-of-powers concerns. The latter rationale is of constitutional import, while the former is not: "[S]eparation of powers was adopted in the Constitution 'not to promote efficiency but to preclude the exercise of arbitrary power.' Time has not lessened the concern of the Founders in devising a federal system which would likewise be a safeguard against arbitrary government." *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959) (quoting *Myers v. United States*, 272 U.S. 52, 240, 293 (1926) (Brandeis, J., dissenting)). Indeed, this court has forcefully recognized this distinction: "We are fully aware of the inefficiency and

expense to which these [parties] are being subjected . . . [but w]e cannot avoid this result [of remanding to state court for lack of subject-matter jurisdiction], for the rules of federal jurisdiction, while sometimes technical and counterintuitive, are strict and mandatory." *Oliver*, 789 F.2d at 343 (Higginbotham, J.).

Second, even if we were to fashion a discretionary rule, there is no certainty that it would be more convenient to district courts than the formulation we adopt today. Because we would wish to draw a discretionary rule in harmony with the constitutional principles that we have outlined, any resulting rule often would cause district courts to spend more time and effort than previously, when considering whether personal jurisdiction should be decided before subject-matter jurisdiction. In any given case, it might be more efficient for a district court to address the tough legal issues of subject-matter jurisdiction rather than to engage in a difficult balancing inquiry regarding personal jurisdiction.

IV.

Therefore, as the panel stated, in a case such as this one, "[t]he appropriate course is to examine for subject matter jurisdiction constantly and, if it is found lacking, to remand to state court if appropriate, or otherwise dismiss." *Marathon*, 115 F.3d at 318 (citing *Ziegler v. Champion Mortgage Co.*, 913 F.2d 228 (5th Cir. 1990)). Such a methodology respects the limits that Congress has placed on the federal courts to adjudicate cases. It also accords the proper respect to the state courts, as the residual

courts of general jurisdiction, to make the personal jurisdiction inquiry when we lack either constitutional or statutory subject-matter jurisdiction over a removed case. *See Healy*, 292 U.S. at 270.

V.

A.

Our holding not only is supported by the aforementioned constitutional precepts, but also is grounded in our prior caselaw. Today we follow our holding in *Ziegler v. Champion Mortgage Co.*, 913 F.2d 228, 229-30 (5th Cir. 1990).

In *Ziegler*, a plaintiff sued in state court alleging a breach of contract. *See id.* at 229. The defendants removed, asserting diversity jurisdiction. *See id.* When the plaintiff moved to remand because diversity jurisdiction was lacking, defendant Champion Mortgage moved to dismiss for want of personal jurisdiction. *See id.* That motion to dismiss was granted; the motion to remand was never addressed, because the district court concluded that its dismissal rendered the remand motion moot. *See id.* Final judgment was entered for the other defendants on the merits, and the plaintiff appealed. We *sua sponte* found complete diversity lacking and vacated the judgment. *See id.*

In doing so, we reiterated that "[f]ederal courts are courts of limited jurisdiction; therefore, we have a constitutional obligation to satisfy ourselves that subject matter jurisdiction is proper before we engage in the merits of an

appeal." *Id.* Our action of vacating the dismissal of Champion Mortgage for lack of personal jurisdiction established that the district court should have resolved subject-matter jurisdiction before entertaining the attack on personal jurisdiction.

The *Ziegler* court was aware that this part of its ruling could be perceived to be in tension with *Walker v. Savell*, 335 F.2d 536, 538 (5th Cir. 1964), in which we had stated that "the federal court had a right to consider the motion to quash service and determine the jurisdictional question before remanding the case to the state court." *Id.* The *Ziegler* court, however, found *Walker* distinguishable, because *Walker* dealt only with a choice between deciding a personal jurisdiction challenge and a remand motion based on a defect in *removal* jurisdiction, not one based on a defect in *subject-matter* jurisdiction. See *Ziegler*, 913 F.2d at 230.

"It is beyond doubt that although the parties can waive defects in removal, they cannot waive the requirement of original subject matter jurisdiction – in other words, they cannot confer jurisdiction where Congress has not granted it." *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1546 (5th Cir. 1991). The defendant in *Walker* was unable to remove to federal court *not* because there was no federal subject-matter jurisdiction, but because 28 U.S.C. § 1441(b) prohibits removal by an in-state defendant in diversity cases.¹² Such a removal defect is waivable if

¹² See *Walker*, 335 F.2d at 539 (observing that "this case was, under the terms of the removal statute, unquestionably in the district court even though later subject to a proper motion for remand").

not timely asserted by the plaintiff. See 28 U.S.C. § 1447(c); *In re Shell Oil Co.*, 932 F.2d 1518, 1522-23 (5th Cir. 1991).

Contrariwise, in this case, neither party contends that the plaintiffs challenged removal on the basis that the defendant had failed to meet the waivable requirements of the removal statutes. Rather, the plaintiffs argue that the district court would lack subject-matter jurisdiction had the plaintiffs originally brought this case in federal court. Such an objection is not subject to waiver, see *Baris*, 932 F.2d at 1546, and is, as explained above, a more fundamental concern of the district court than is a waivable defect.

When subject-matter jurisdiction is not in question, accordingly, we continue to believe that the district court should enjoy the freedom outlined in *Walker* to decide which waivable jurisdictional defect to address in the first instance. "Thus, resting as it does on the broader issue of subject matter jurisdiction, our decision today does not affect this Court's holding in *Walker v. Savell*." *Ziegler*, 913 F.2d at 230.

B.

Ruhrgas also argues that our rejection of the discretionary rule would be inconsistent with the well-settled principle that federal courts have jurisdiction to conduct discovery, to issue sanctions, to hold a trial, and to assess costs, even though they may lack subject-matter jurisdiction. See, e.g., *Willy v. Coastal Corp.*, 503 U.S. 131, 135-36 (1992) (upholding FED. R. CIV. P. 11 sanctions even though

the district court eventually concluded that it lacked Article III jurisdiction). The flaw with this argument, however, is that the functions to which Ruhrgas points do not have the adverse consequences of making a case-dispositive decision for the state court.

Should a federal court without statutory subject-matter jurisdiction issue sanctions, assess costs, hold a trial, or conduct discovery, any subsequent remand and proceedings that follow in state court will remain unaffected by those federal court actions. Such is not the case when a federal court dismisses for want of personal jurisdiction. In the instant case, for example, the dismissal for lack of personal jurisdiction not only ends all federal court litigation, but also ends all litigation in the state court to which the case would otherwise be remanded.¹³

C.

1.

We granted en banc review in part to resolve the conflicting precedents of this court, for *Ziegler* conflicts with *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1494 (5th Cir. 1993), and *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559, 566-67 (5th Cir. 1993).¹⁴

¹³ Given existing caselaw, the federal court's determination that there was no personal jurisdiction would be preclusive on the state court from which the case was removed. See *supra* note 9 (citing cases).

¹⁴ In accordance with our rule of orderliness, subsequent panels cannot overrule prior panels, absent en banc review or a change in law by Congress or the Supreme Court. See, e.g., *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997).

In *Asociacion Nacional*, the district court denied plaintiffs' motion to remand for want of subject-matter jurisdiction and proceeded to dismiss for lack of personal jurisdiction. See *Asociacion Nacional*, 988 F.2d at 563. On appeal, a panel of this court decided that the court had erred in failing to remand, as there was no federal subject-matter jurisdiction. See *id.* at 563-66. Instead of vacating the dismissal for lack of personal jurisdiction and remanding with instructions to remand to state court, the panel affirmed. See *id.* at 566-67.

The panel began its analysis by noting the "conceptually troubling" proposition that we could "sustain[] an order by the district court in a case over which the court did not have subject matter jurisdiction." *Id.* at 566. Unaware, however, that *Ziegler* had already foreclosed an expansion of *Walker* for the very "conceptually troubling" reasons that the *Asociacion Nacional* panel had identified, the panel expanded *Walker's* holding and affirmed the dismissal for lack of personal jurisdiction. *Id.* at 566-67.

A month after *Asociacion Nacional*, still another panel overlooked *Ziegler's* decision not to extend *Walker*. In *Villar*, 990 F.2d at 1494, we opined that "[i]n *Walker*, we

Accordingly, *Ziegler* remains good law, even in the face of *Villar* and *Asociacion Nacional*. Nonetheless, and especially in view of the fact that the *Asociacion Nacional* and *Villar* panels apparently were unaware of *Ziegler*, we use this en banc opportunity to eliminate any confusion.

The panel in *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1066 (5th Cir. 1992), also mentioned, in *dictum*, that *Walker* supports a discretionary rule. That observation was not essential to the holding. Accordingly, that case (shorn of its *dictum*) remains unaffected by our decision today.

clearly held that district courts have the power to rule on motions challenging personal jurisdiction before reaching motions to remand." *Id.*

For the reasons explained above, Ziegler's interpretation of *Walker* is the better one. Indeed, had the *Villar* and *Asociacion Nacional* panels made their decisions in the knowledge, and with the benefit, of Ziegler's analysis,¹⁵ they too may have reached a different result.

2.

Ruhrgas argues that turning back the reach of *Walker* would conflict with the view of the Second Circuit, which has adopted a discretionary rule. *See Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155 (2d Cir. 1996).¹⁶ We find

¹⁵ Although *Ziegler* was decided three years prior to *Asociacion Nacional* and *Villar*, neither opinion mentions *Ziegler*.

¹⁶ *See also Cantor Fitzgerald*, 88 F.3d at 155 ("In our opinion, the District Court properly exercised its discretion in first deciding the motion to dismiss for lack of personal jurisdiction over the defendants before considering the question of federal subject-matter jurisdiction."). The Seventh Circuit, as well, mentioned and assumed a *Villar*-type interpretation of *Walker*, but ultimately expressed no opinion on the matter. *See Allen v. Ferguson*, 791 F.2d 611, 616 (7th Cir. 1986) ("[E]ven assuming *arguendo* that the *Walker* rule is correct, we find that the district court erred in deciding *Ferguson*'s motion to dismiss for want of personal jurisdiction before determining whether there was complete diversity."). That court also stated, in passing, that the district court could have discretion to decide an easier personal jurisdiction challenge before addressing questions about its subject-matter jurisdiction when the federal and state courts'

Ruhrgas's concerns unjustified; its reliance on *Cantor Fitzgerald* is misplaced, as we now explain.

First, *Cantor Fitzgerald* conflicts with an earlier Second Circuit opinion, *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674 (2d Cir. 1990), in which that court held that "[t]he court below mistakenly passed on the asserted absence of personal jurisdiction over the Guaranty Association defendants. Where, as here, the defendant moves for dismissal under Rule 12(b)(1), Fed.R.Civ.P., as well as on other grounds, 'the court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined.'" *Id.* at 678 (quoting 5 CHARLES A. WRIGHT & ARTHUR MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1350 (1st ed. 1969)). In light of *Rhulen*, the Second Circuit appears to have internally inconsistent views on this issue.¹⁷

standards for personal jurisdiction would render the same conclusion that no personal jurisdiction exists. *See id.* at 615.

Although this rule is appealing because it recognizes the comity interests inherent in any exercise of the district court's discretion, ultimately we find this conclusion "conceptually troubling." *Asociacion Nacional*, 988 F.2d at 566. Admittedly, when we have proper jurisdiction, we often apply state courts' interpretations of their own laws under a "no harm, no foul" type rule (That is, we assume the state court would not change its interpretation of its own law in the case before us). When we lack subject-matter jurisdiction, however, we should leave the state courts free to apply their own law, as well as federal law, as they have interpreted it in the past, or as they wish to reinterpret it in the present.

¹⁷ Compare *Rhulen*, 896 F.2d at 675-76 ("[T]he order below will be affirmed but on the ground that the Court lacks subject

Second, the *Cantor Fitzgerald* court grounded its holding primarily on *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151, 159-60 (2d Cir. 1990).¹⁸ *Muszynski* was one of the cases adopting the now-discredited "doctrine of hypothetical jurisdiction" – finding that a federal court could reach an easier merits question before addressing a harder subject-matter jurisdiction challenge. See *Steel Co.*, 118 S.Ct. 1012 (citing *Muszynski* for this proposition). Once a court has determined that it can pretermitt its jurisdiction to reach the merits, the decision to pretermitt subject-matter jurisdiction to reach personal jurisdiction is easily made. As the Second Circuit has recently recognized, however, *Muszynski* is no longer good law after *Steel Co.* See *Fidelity Partners, Inc. v. First Trust Co.*, 1998 U.S.App. LEXIS 8072, at *14-*15 (2d Cir. Apr. 27, 1998) (Nos. 97-9589L, 97-963CON).

In sum, not only are the cases that Ruhrgas cites to support its advocacy of a discretionary rule in a case such as ours "conceptually troubling," *Asociacion Nacional*, 988 F.2d at 566, but they are also aberrational. Accordingly,

matter jurisdiction, which precludes consideration of the existence of personal jurisdiction."), with *Cantor Fitzgerald*, 88 F.3d at 155.

¹⁸ The *Cantor Fitzgerald* court also relied on *Can v. United States*, 14 F.3d 160, 162 n.1 (2d Cir. 1994), and *Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 584 n. 2 (2d Cir. 1993). Neither of these cases, however, supports *Cantor Fitzgerald's* holding. *Can* discusses which subject-matter jurisdiction challenge a district court should address first. See *Can*, 14 F.3d at 162 n.1. *Bi* adopts no rule, but instead addresses subject-matter jurisdiction before considering personal jurisdiction. See *Bi*, 984 F.2d at 584 n.2.

we decline to follow their lead and instead adopt the reasoning of *Ziegler* and *Rhulen*.

VI.

We now address some of Ruhrgas's other arguments. Specifically, we discuss the fairness implications for the removing defendant; the applicability of the minimum-contacts analysis in determining whether subject-matter jurisdiction exists; and the argument that our rule may have the effect of unnecessarily entangling the federal courts in difficult issues of state law and the state courts in issues of federal law.

A.

We are mindful that the personal-jurisdiction requirement embodies a rule of fundamental fairness for defendants. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985). We therefore appreciate Ruhrgas's argument that it would be unfair to force the defendant, which we assume *arguendo* is not subject to personal jurisdiction in any court, to litigate, upon removal, subject-matter jurisdiction in federal court only to be forced to return to state court to litigate personal jurisdiction there (if federal subject-matter jurisdiction is found not to exist).

We find this argument ultimately unpersuasive, however. The defendant's action in seeking to invoke the jurisdiction of the federal courts, through removal, indicates its willingness – indeed, its preference – to litigate the issue of subject-matter jurisdiction, a question on

which it has the burden of proof.¹⁹ Had the issue of personal jurisdiction been more easily resolved in its favor than was the question of subject-matter jurisdiction, the defendant had the option to save itself the time and expense of litigating federal subject-matter jurisdiction by litigating the easily-resolved personal jurisdiction challenge in the state courts before removal. In any case, the fundamental-fairness requirement of personal jurisdiction will still be examined – by either state or federal court – after the district court has made its inquiry into subject-matter jurisdiction.²⁰

¹⁹ See *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365 (5th Cir. 1995) (citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921)).

²⁰ We recognize that there may be a few instances in which “the jurisdictional facts are too intertwined with the merits to permit the [remand motion] determination to be made independently . . . [thus forcing the court to] leave the jurisdictional determination to trial.” 2 JAMES W. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 12.30[3], at 12-37 (3d ed. 1998). Although many of the same considerations we express today may apply to such cases, other concerns may arise as well. Because the instant case deals solely with the decision to exercise discretion to address personal jurisdiction first because the legal issues of subject-matter jurisdiction are more complex than the legal issues surrounding personal jurisdiction, we have no occasion to opine on what rule should apply when the facts needed to support subject-matter jurisdiction are so “intertwined with the merits” of the case that they must await trial.

We also do not mean to straightjacket the district courts by designating what proceedings they may conduct, or in what order those proceedings must be conducted, when there is a pending issue as to subject-matter jurisdiction. Accordingly, while the *Ruhlen* court and professors Wright and Miller opine

B.

Ruhrgas also argues that, in cases like the instant one, our determination of subject-matter jurisdiction depends on an analysis of personal jurisdiction. See *Villar*, 990 F.2d at 1494-95. Because we are going to have to conduct the minimum contacts inquiry in any event, Ruhrgas avers, we might as well do it at the outset.

Specifically, Ruhrgas contends that Norge is included as a plaintiff solely to defeat federal diversity jurisdiction. One of the ways in which Ruhrgas attempts to prove that Norge has been “fraudulently joined” is to show that Norge could assert no claims against it. See *Marathon*, 115 F.3d at 319. To show that Norge has no viable claim, Ruhrgas argues that Norge could not subject Ruhrgas to service of process – that is, personal jurisdiction – in Texas state court.

Assuming, *arguendo*, that *Villar* correctly found that the minimum contacts analysis is relevant to a fraudulent joinder analysis, it does not alter our obligation to decide questions of subject-matter jurisdiction at the outset. For instance, assume that the district court determines that because Norge cannot serve Ruhrgas, Norge has been

that a court should consider a rule 12(b)(1) challenge first, see *supra*, we read this to mean that the court must *rule* on the subject-matter jurisdiction challenge first. In their discretion, however, the courts are free to allow various aspects of the proceedings to go forward, as efficiency and fairness may dictate. “The district court is free to decide the best way to deal with [matters covered by rule 12(b)], because neither the federal rules nor the statutes provide a prescribed course.” 2 MOORE ET AL., *supra*, § 12.50, at 12-102 through 12-103.

fraudulently joined. It does not follow that we should allow the district court the discretion to address personal jurisdiction first. Rather, in such a case, given the principles we have outlined above, the district court should find federal diversity subject-matter jurisdiction to exist, and proceed to decide the personal jurisdiction challenge without fear of trampling on the state courts' residual domain.

C.

Ruhrgas maintains that the rule we adopt could entangle federal courts unnecessarily in difficult decisions of state law joinder, and state courts in the federal law of personal jurisdiction. Specifically, Ruhrgas first argues that it plans to raise fraudulent joinder to establish diversity jurisdiction; the court's analysis will require the resolution of complex areas of state law. Second, Ruhrgas claims that the question of personal jurisdiction does not interfere with the state courts' autonomy, as the Texas long-arm statute reaches as far as the Constitution permits;²¹ the inquiry, thus, is one of constitutional, not state, law.

Although we appreciate Ruhrgas's first argument, our adoption of it would create incentives for defendants in Ruhrgas's position to act opportunistically in the removal context. Essentially, the defendant's argument is that because it plans to invoke a convoluted theory of

²¹ See *Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990) (interpreting the Texas long-arm statute to reach the federal constitutional limit).

subject-matter jurisdiction to support removal – one requiring difficult interpretations of state law – we should dispense with its need to prove that federal subject-matter jurisdiction exists and proceed to grant it a dismissal for lack of personal jurisdiction. We find that argument unappealing.

We dispense with Ruhrgas's second argument even more expeditiously. As we have already described, Article III envisions state courts as the default for all claims, based in both state and federal law. See *Healy*, 292 U.S. at 270; *supra* part II. Where Congress has not extended federal subject-matter jurisdiction, we should respect the Article III default of residual state court jurisdiction. See, e.g., 13 *WRIGHT, ET AL., supra*, § 3522, at 61-62. Therefore, although the ultimate issue might prove to be one of federal law, we may not deprive state courts of their authority to pass on that question.²²

VII.

A.

We end by noting that our ruling today applies only to removed cases and is otherwise limited as mentioned above. Cases brought originally in the federal courts may raise other issues that we do not face in the instant case,

²² Cf. *Tafflin*, 493 U.S. at 467 ("[W]e note that, far from disabling or frustrating federal interests, '[p]ermitting state courts to entertain federal causes of action facilitates the enforcement of federal rights.'") (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 n.4 (1981)).

so any opinion as to those issues would, as a consequence, be premature.

B.

We also understand that the district court's decision to address the personal jurisdiction question at the outset was reasonably made, given the state of our existing precedent. Because of the novelty of some of the subject-matter jurisdiction claims, and because our court has been understandably pre-occupied in reconciling the confused state of our precedent concerning a district court's obligations, we remand the issue of whether there exists federal subject-matter jurisdiction to the able district court for its determination in the first instance.²³

The judgment is VACATED, and this cause is REMANDED with instruction to address the motion to remand to state court for lack of federal subject-matter jurisdiction, and for other proceedings, as appropriate, consistent with this opinion.²⁴

²³ Although the district court may consider the panel opinion persuasive on the question of subject-matter jurisdiction, that opinion has been vacated and thus is no longer binding precedent, *see* 5TH CIR. R. 41.3; *United States v. Manges*, 110 F.3d 1162, 1173 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1675 (1998), and we express no opinion on that issue.

²⁴ Ruhrgas's motion to strike the plaintiffs' response to the amici filings is DISMISSED as moot.

PATRICK E. HIGGINBOTHAM, Circuit Judge, with whom KING, JOLLY, DAVIS, JONES, DUHÉ and BARKSDALE, Circuit Judges, join, dissenting:

Until the decision of the panel in this case, affirmed today by the majority, no appellate court in the United States had held that federal district courts may never dismiss a case for lack of personal jurisdiction without first deciding their subject matter jurisdiction. We elaborate the principles behind the regimen that had been in place in our circuit, concluding that the majority's claim of federalism on the facts before us is impoverished, a cape for unauthorized appellate rule making.

I.

Marathon Oil Company (MOC) is an Ohio corporation with its principal place of business in Houston, Texas. In 1976, MOC's affiliate, Marathon International Oil (MIO), purchased two European concerns, Pan Ocean and its subsidiary Pan Norge, who collectively held a North Sea gas production license. Pan Ocean later became Marathon Petroleum Norway (MPN), while Pan Ocean Norge was later renamed Marathon Petroleum Norge (Norge). The gas production license gave the Marathon companies the rights to 24% of the Heimdal gas field in the North Sea.

According to the Marathon plaintiffs, starting in the 1970's, Ruhrgas, A.G.; Statoil; and various other European companies secretly conspired to monopolize the gas market in Western Europe. Ruhrgas is Germany's primary gas production firm, while Statoil, Norway's state-owned gas company, has held since 1975 a 40% interest in

the Heimdal field. The plaintiffs allege that the conspirators planned to control the Western European gas market by channeling a large portion of North Sea gas reserves through Ruhrgas's production facilities in Germany.

As part of this "plan," Ruhrgas entered into an agreement in 1984 with MPN concerning the Heimdal gas field. Pursuant to the Heimdal Agreement, MPN was to drill gas from the Heimdal field and transfer it to the Ruhrgas plant in Germany. In exchange, Ruhrgas promised to provide MPN with premium prices for its gas and guaranteed pipeline transportation tariffs. The Heimdal Agreement contained a clause binding its signatories to arbitration in Stockholm, Sweden, under Norwegian law. The plaintiffs claim that Ruhrgas never had any intention of honoring its commitments under the Agreement.

The Marathon plaintiffs in this case, MOC, MIO, and Norge, were not formal parties to the Agreement, and they purport not to be seeking its enforcement in this litigation. Rather, the Plaintiffs allege that Ruhrgas's representations regarding the Agreement duped them into investing in their subsidiary, MPN, \$300 million for the development of the Heimdal field and the erection of an underseas pipeline to the Ruhrgas plant in Germany. According to the plaintiffs, this investment played right into Ruhrgas's hands; after having expended such enormous sums to construct a pipeline between the Heimdal field and the Ruhrgas plant, the Marathon companies had no choice but to sell the Heimdal gas to Ruhrgas on terms dictated by Ruhrgas. Norge additionally asserts that the value of its license to produce Norwegian gas, dependent upon the Ruhrgas-MPN contract, was also held hostage by Ruhrgas.

Allegedly, Ruhrgas later failed to honor the premium prices and tariffs that it had promised to MPN. Thereafter, MOC, MIO, and Norge sued Ruhrgas in Texas state court for fraud, misrepresentation, civil conspiracy, and tortious interference with business relationships. Ruhrgas removed the case to federal court, invoking both diversity and federal question jurisdiction, as well as the statutory provision for the removal of cases relating to arbitration agreements falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *see* 9 U.S.C. § 205. Once in federal court, Ruhrgas moved for a stay of proceedings pending the European arbitration of MPN's case, but the district court denied Ruhrgas's request. Ruhrgas then moved to dismiss the case for lack of personal jurisdiction and on grounds of *forum non conveniens*, while Marathon countered by moving to remand for lack of subject matter jurisdiction. The district court, relying on long-standing Fifth Circuit precedent, *see, e.g., Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964), opted to decide first Ruhrgas's challenge to personal jurisdiction. The court granted Ruhrgas's motion to dismiss for lack of personal jurisdiction, rendering the plaintiffs' motion to remand moot. The court later denied Ruhrgas's motion to reconsider its previous decision not to stay all proceedings pending arbitration.

Both parties appealed. Despite the fact that the district court had dismissed the case for want of personal jurisdiction, a panel of our court held that it could not ignore the plaintiffs' challenge to subject matter jurisdiction. *See Marathon Oil Co. v. Ruhrgas, A.G.*, 115 F.3d 315, 317-19 (5th Cir. 1997). Concluding that subject matter jurisdiction was indeed lacking, the panel vacated the

judgment of the district court and ordered the case remanded to state court.

II.

A.

No rule of civil procedure denies a federal district court the discretion to dismiss a case for want of jurisdiction by footing its decision upon a lack of personal jurisdiction rather than subject matter jurisdiction. A range of discretion to choose the basis for a dismissal for want of jurisdiction has long been recognized, and no court, until the panel opinion, had said otherwise. *See, e.g., Wilson v. Belin*, 20 F.3d 644, 651 n.8 (5th Cir.), *cert. denied*, 513 U.S. 930 (1994); *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1494 (5th Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994); *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559, 566-67 (5th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994); *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1066 (5th Cir.), *cert. denied*, 506 U.S. 867 (1992); *Walker*, 335 F.2d 536.¹ The practice has been so

¹ The majority opinion misreads the facts of *Walker*. The majority contends that *Walker* dealt only with the technical scope of the removal statute, for "[t]he defendant in *Walker* was unable to remove to federal court *not* because there was no federal subject-matter jurisdiction, but because 28 U.S.C. § 1441(b) prohibits removal by an in-state defendant in diversity cases." Majority op. at 18. Yet there were two defendants in *Walker*. The in-state defendant removed by invoking federal question jurisdiction, and the out-of-state defendant did so by citing diversity jurisdiction. *See Walker*, 335 F.2d at 538 ("Asserting that a separable controversy was alleged against Savell, arising under the laws of the United States, and in view of the non-resident status of Associated Press, the suit was

commonplace that only two other circuits have even had the occasion to address the issue, despite its regular appearance on the dockets of federal trial courts across the country. *See, e.g., Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155 (2d Cir. 1996); *Allen v. Ferguson*, 791 F.2d 611, 615 (7th Cir. 1986).² Practices do not become legitimate by

removed to United States District Court. . . ."). *Walker* makes no mention of the in-state defendant rule because that rule was irrelevant.

² Both *Cantor* and *Allen* agreed that district courts have discretion to dismiss for lack of personal jurisdiction in lieu of remanding for a lack of subject matter jurisdiction. It is true, as the majority opinion notes, that *Cantor* cites to a case advocating the now-overruled "hypothetical jurisdiction" doctrine. *See Cantor*, 88 F.3d at 155 (citing *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151 (2d Cir. 1990)). Yet *Cantor* did not premise its holding on the notion of "hypothetical jurisdiction," and the sensible comments the *Cantor* court made about personal jurisdiction were untouched by *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1012 (1998). The majority's conclusion that *Cantor* conflicted with the earlier Second Circuit opinion in *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674 (2d Cir. 1990), is in error. *Cantor* expressly distinguished *Rhulen* on the basis that the personal jurisdictional defect in *Rhulen* was not easier to resolve than the defect in subject matter jurisdiction. The majority opinion makes no mention of the fact that *Cantor* treated and distinguished *Rhulen*. Judge Newman was a member of both panels. Our view of Second Circuit law is controlled by what that circuit says it is.

Although the *Allen* court declined to embrace "the broader reading of *Walker*," *Allen*, 791 F.2d at 615, the *Allen* court at least assumed that in certain circumstances a district court could dismiss for want of personal jurisdiction rather than remand for a defect in subject matter jurisdiction. Otherwise, it need never have conducted an analysis of the relative complexities of the alleged jurisdictional defects before it. *See id.* at 616.

virtue of their long standing. Yet for the simple truth that we stand on the shoulders of those before us, if for no other reason, we must be hesitant when we act on recent flashes of "new" insight to the fundamentals of governance.³

The majority reverses course and holds that district courts possess no discretion to decide issues of personal jurisdiction before those of subject matter jurisdiction. This contention inexplicably relies upon an obvious and settled, but irrelevant proposition: federal courts are without the authority to decide the merits of a case when they lack subject matter jurisdiction. *See, e.g., B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 548 (Former 5th Cir. 1981). Relatedly, the argument continues, courts must raise the issue of subject matter jurisdiction sua sponte, *see, e.g., Trizec Properties, Inc. v. United States Mineral Prods. Co.*, 974 F.2d 602 (5th Cir. 1992); and parties may not waive defects in subject matter jurisdiction, *see, e.g., California v. LaRue*, 409 U.S. 109, 112 n.3 (1972). The argument points to a recent decision of the Supreme Court repudiating the practice of "assuming" [subject matter jurisdiction] for the purpose of deciding the merits." *Steel*

³ The majority opinion relies heavily on *Ziegler v. Champion Mortgage Co.*, 913 F.2d 228 (5th Cir. 1990). Judge Gee in *Ziegler* was presented with a *merits judgment* rendered against two defendants, both of whom were from the same state as the plaintiff. The third defendant had long since been dismissed for a want of personal jurisdiction, a dismissal that was not before Judge Gee. The *Ziegler* panel thus did the obvious thing and vacated the judgment for a want of diversity jurisdiction. A suggestion that the situation facing Judge Gee is somehow analogous to the one before us is mistaken.

Co. v. Citizens for a Better Environment, 118 S.Ct. 1003, 1012 (1998). The *Steel Co.* Court stressed that "the requirement that jurisdiction be established as a threshold matter . . . is 'inflexible and without exception,' " *id.* (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)), and that "[w]ithout jurisdiction the court cannot proceed at all in any cause," " *id.* (quoting *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1868)). The plain lack of relevance in this contention teases us to look for more, for surely more there must be.

Ultimately the majority derives from this case law an ordering of jurisdictional concepts headed by subject matter jurisdiction, with the correlative that federal courts must always resolve challenges to subject matter jurisdiction before challenges to personal jurisdiction. The contention that subject matter jurisdiction exists above personal jurisdiction in some hierarchy of jurisdictional importance is untenable. It sees personal jurisdiction in a subordinate role, nigh a merit determination. This contention misunderstands jurisdiction. Justice Holmes put it succinctly: "The foundation of jurisdiction is physical power." *McDonald v. Mabee*, 243 U.S. 90, 91 (1917). Personal and subject matter jurisdiction do not differ in relevant ways. As we will explain, a federal district court is powerless to decide the merits of a case if it lacks either subject matter or personal jurisdiction. Both jurisdictional requirements are rooted in constitutional commands of case or controversy and due process. And both are implemented by the Congress. As Justice O'Connor recognized in *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833 (1986), Article III protects both personal and structured interests.

It simply cannot be gainsaid that "[t]he validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties." *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 701 (1982) (emphasis added); see also *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938). As the Supreme Court noted in 1937, personal jurisdiction is as integral to the power of a federal court as is subject matter jurisdiction:

Counsel for the petitioner assume that the presence of the defendant was not an element of the court's jurisdiction as a federal court; but the assumption is a mistaken one. By repeated decisions in this Court it has been adjudged that the presence of the defendant in a suit *in personam*, such as the one now under discussion, is an essential element of the jurisdiction of a district (formerly circuit) court as a federal court, and that in the absence of this element *the court is powerless to proceed to an adjudication*.

Employers Reinsurance Corp. v. Bryant, 299 U.S. 374, 382 (1937) (footnote omitted and emphasis added). Indeed, the requirement that federal courts possess personal jurisdiction over the parties is not derived from extralegal judicial concerns about fairness or equity; rather, it is rooted in the Due Process Clause of the Constitution. See *Compagnie des Bauxites*, 456 U.S. at 702.

Subject matter jurisdiction is best understood as a structural right, for "it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign." *Id.* Personal jurisdiction, on the other hand, is an "individual liberty interest" which "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Id.* This

difference accounts for the fact that personal jurisdiction may be waived by the parties, whereas subject matter jurisdiction may not. Compare *Commodity Futures Trading Comm'n*, 478 U.S. at 850-51 (noting that structural rights may not be waived), with *Compagnie des Bauxites*, 456 U.S. at 703 (noting that individual rights may be waived).⁴ From this principle follows naturally the rule that defects in subject matter jurisdiction must be raised by a court *sua sponte*, while deficiencies in personal jurisdiction need not. Where the parties do not challenge personal jurisdiction, their failure can be construed as a functional waiver, whereas parties cannot waive subject matter jurisdiction by their silence. The simple fact that personal jurisdiction is subject to waiver, however, does not somehow function to elevate subject matter jurisdiction in status. Both are critical to the power of a court; both are rooted in core constitutional precepts.

There is sequence to be sure. Questions of standing and subject matter jurisdiction are usually engaged at the outset of a case, and often that is the most efficient way of going. The majority's effort to support a mandated sequence, however, rests on a flawed vision of the relationship between Article III and the power of the inferior courts. It is true that Article III limits disputes that Congress can assign to the federal courts, both in terms of

⁴ Even this description of the difference between subject matter and personal jurisdiction is an overstatement. Personal jurisdiction can express territorial limits, akin to securing sovereign interests. The structured protections of subject matter jurisdiction are heavily influenced by consent. See *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Commodity Futures Trading Comm'n*, 478 U.S. 833.

case or controversy and in terms of disputes finally resolvable by courts. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792). It is equally true that Article III grants to Congress the authority both to create inferior courts and to confer so much of the jurisdiction authorized by Article III that Congress chooses. The multi-purposed role of Article III with the hand of Congress at every turn belies the assertion that personal jurisdiction enjoys lesser regard than subject matter jurisdiction – Due Process as opposed to Article III. Thus, when federal courts examine our subject matter jurisdiction, we are ordinarily construing the jurisdiction-authorizing statutes present in Title 28 of the U.S. Code, not Article III or any power flowing directly from it. Indeed, one of the attacks upon jurisdiction pointed to here as a defect in subject matter jurisdiction – a lack of complete diversity – is not itself a requirement of Article III, but rather suffers from want of a jurisdictional grant by Congress. In the literal sense then, personal jurisdiction rests more immediately upon a constitutional command than does a want of complete diversity. Contrary to the majority's suggestion, there is no subordinate role for personal jurisdiction in these fundamentals of our federalism.

Although the majority heavily relies upon the inapposite *Steel Co.* decision, it is in fact the majority that cannot square its opinion with recent Supreme Court jurisprudence. In *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467 (1996), a unanimous Court employed long-standing precedent to hold that a district court's judgment may stand in a removed case even if the court lacked subject matter

jurisdiction at the time of removal, so long as the jurisdictional defect was cured by the time of judgment. In *Caterpillar*, upon removal there was a lack of complete diversity between the parties, but this defect was later cured by the district court's subsequent dismissal of a nondiverse defendant following a settlement between the parties. Indeed, the plaintiff in *Caterpillar* explicitly objected to jurisdiction shortly after removal, an objection that was erroneously overruled by the trial court. The majority opinion in this case travels against *Caterpillar*, for its absolutist approach to subject matter jurisdiction would suggest that every decision entered by the *Caterpillar* district court following the improper removal, from the dismissal of the nondiverse party to the entry of final judgment, was void. If the Supreme Court tolerates a capture of jurisdiction through the dismissal of a settling party by a court that lacked subject matter jurisdiction, surely it permits a district court to dismiss a case for want of personal jurisdiction, before considering a challenge to subject matter jurisdiction.

It is well settled that federal courts have jurisdiction to determine their own jurisdiction. *See, e.g., Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1078 (7th Cir. 1987). In the end, the majority concludes that this "jurisdiction to determine jurisdiction" does not encompass "jurisdiction to determine personal jurisdiction"; that a court without subject matter jurisdiction lacks the power to dismiss the case for lack of personal jurisdiction. As we have stated, there is no authority, either in the Constitution or the case law, to support this conclusion. Ironically, if the district court lacked the power to dismiss for want of personal jurisdiction because it lacked (had not

decided) subject matter jurisdiction, the dismissal would have no binding effect on the state court. Yet binding effect is the premise of the majority's invoking of federalism.

B.

Much is made here of the fact that this case was removed from state court. Indeed, the majority opinion attempts to limit itself to removal situations.⁵ It is presumed that removal is an affront to states' interests and federalism. This argument fails to grasp the centrality of removal in our complex of state and federal courts. Removal jurisdiction is an integral part of our federalism, having been present since the Judiciary Act of 1789. Sec. 14, The Judiciary Act of 1789 (1 Stat. 73). Indeed, in the famous and early debate about the scope of federal jurisdiction in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), both sides proceeded from the assumption that removal was a fundamental, and noncontroversial, aspect of our federalist judicial system. See *id.* at 348-51 (Story, J.); *id.* at 378 (Johnson, J., concurring).

In 28 U.S.C. §§ 1331 & 1332, Congress allocated the concurrent jurisdiction of the federal and state courts. Congress has periodically expanded the scope of removal

⁵ Even assuming that there is, however, a hierarchy among jurisdictional issues grounded upon the structural limits ("Article III limits") of the federal courts' authority, as the majority opinion asserts, no principle justifies a distinction between cases removed to federal court and cases filed there originally. If the majority opinion's rule is true for removal, it is true for every form of federal jurisdiction.

jurisdiction where it was believed necessary to afford federal defendants or interests a federal forum or otherwise to promote uniformity in federal law. See, e.g., 28 U.S.C. § 1443 (civil rights removal statute). Under this system, the statutory scheme is tilted toward adjudication of removable cases in federal court,⁶ for state proceedings may not go forward unless both parties agree to forsake federal jurisdiction. Under 28 U.S.C. § 1441, defendants (unless they are local defendants) have the unilateral right to remove cases from the state courts. Similarly, if a plaintiff files a removable case in federal court, there is no corresponding statutory provision permitting the defendant to remand the case to state court. Accordingly, contrary to the position taken by the majority opinion, there is no substantive distinction between cases removed and those originally filed in federal court; both reflect a party's choice not to proceed in state court. Neither situation represents a constitutional misallocation of power to federal courts at the expense of state courts.

Absent bad-faith removal, a federal court's decision to address a defect in personal jurisdiction before one in subject matter jurisdiction therefore does not somehow frustrate the plaintiff's choice of forum, for Congress explicitly limits the presumptive status of concurrent jurisdiction by defining a defendant's right of removal. Its federal defenses aside, a defendant has a right equal to the plaintiff to invoke the jurisdiction of the federal court

⁶ Of course, we are to construe the removal statute narrowly. See *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988). Yet when removal applies, it places the state/federal forum decision in the defendant's hands.

for decision of the plaintiff's claims. Thus, so long as federal subject matter jurisdiction is nonfrivolously invoked, federalism offers no reason to distinguish between first engaging personal or subject matter jurisdiction. The removal statute itself contemplates removal before any state court adjudication of personal jurisdiction. Cf. 28 U.S.C. § 1448 (permitting first service of process after removal); 14A Wright & Miller, § 3721, at 228-29 ("A defendant . . . may move to dismiss for lack of personal jurisdiction after removal.") (notice of removal must be filed within thirty days of receipt of initial pleading). Courts frustrate no federalism principles when they address the constitutional issues of personal jurisdiction before addressing subject matter jurisdiction in a removed case.

C.

Of course, even though subject matter and personal jurisdiction are of equal importance to a federal court, challenges to one must inevitably be decided before challenges to the other. That said, the choice of a district court, its exercise of discretion, should be guided by familiar considerations. Here concerns such as efficiency and avoiding abuse of rights of removal become relevant – and indeed on the proper facts, so does federalism.

State and federal courts are equally competent to decide issues of personal jurisdiction, where those issues turn on federal constitutional law. See *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976). In a diversity case, when a federal district court grants a motion to dismiss for want of personal jurisdiction over a non-resident of the forum

state, the ruling precludes the state court from deciding again the personal jurisdictional issue. See *Baldwin v. Iowa State Traveling Men's Assoc.*, 283 U.S. 522, 524-27 (1931) (concluding that federal court determinations as to personal jurisdiction are *res judicata* in subsequent litigation in state court). Simultaneously, it leaves subject matter jurisdiction for a second federal forum that has personal jurisdiction over the parties. Yet although this reality of the rules of preclusion is important, it is not determinative of whether a district court may move directly to the issue of personal jurisdiction.

In our view a district court should ordinarily first satisfy itself of its subject matter jurisdiction. Nonetheless, we would continue to hold that there are limited circumstances under which it may be more appropriate for the federal court to decide the issue of personal jurisdiction first. The case before us today is a good example.

When a challenge to personal jurisdiction is relatively straightforward and does not involve complex state-law questions, but the alleged defect in subject matter jurisdiction raises difficult issues of law, a district court's concerns for federalism may give way to its self-restraint. In general, district courts must avoid ruling on difficult, complex, or novel matters, if an easier and equally appropriate ground for decision is available to them. See *Allen*, 791 F.2d at 615 ("Of course, in keeping with the notions of judicial restraint, federal courts should not reach out to resolve complex and controversial questions when a decision may be based on a narrower ground."). At the same time, resolving a simple

matter of personal jurisdiction, premised on federal constitutional law, intrudes little upon the domain of state courts. If a federal court should determine that an issue of personal jurisdiction is resolved easily in favor of a defendant, little is accomplished, and much is wasted, by a remand to state court to permit that tribunal to come to the same conclusion.

True, such a course of action "precludes" the state court from deciding the issue of personal jurisdiction. Yet it is inevitable in our dualistic but hierarchical system of federal and state courts that the state courts will occasionally, for efficiency's sake, be deprived of the opportunity to pass on certain matters otherwise available to them; indeed, the very concept of supplemental jurisdiction is premised on this notion. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) ("[Supplemental jurisdiction's] justification lies in considerations of judicial economy, convenience, and fairness to litigants. . . .").⁷ Where, as here, the issue precluded from decision is a relatively simple question of federal law, blind invocations of "federalism" should give way to more sensible uses of judicial discretion. Of course, efficiency concerns cannot offer a justification for a federal court to reach the merits of a dispute in the absence of federal jurisdiction, personal or subject matter. There must be jurisdiction to decide the merits. That is what jurisdiction is. See *Oliver v.*

⁷ The contours of the discretion that we would reaffirm mirror closely the contours of district courts' discretion to exercise their supplemental jurisdiction. See 28 U.S.C. § 1367(c) (directing district courts to avoid supplemental claims that predominate over federal claims or raise novel or complex issues of state law).

Trunkline Gas Co., 789 F.2d 341, 343 (5th Cir. 1986) (a position reaffirmed by the Supreme Court a decade later). But given that there exists no "jurisdictional hierarchy," efficiency concerns can instruct the decision to dismiss for a defect in one jurisdictional basis as opposed to another.

Apart from the comparative simplicity of the challenges to a case's jurisdictional bases, other factors should inform a district court's decision to determine the order in which jurisdictional defects are addressed. The majority suggests that defendants might manufacture claims to subject matter jurisdiction in order to obtain a federal forum to hear their attacks on personal jurisdiction. Yet as the cases dismissed by the majority have recognized, district courts should opt to address challenges to personal jurisdiction only when removal is not frivolous and is made in apparent good faith. See *Pescadores*, 988 F.2d at 566-67. On the other hand, often-times the question of subject matter jurisdiction turns in part upon the presence of personal jurisdiction. In such situations, it is even more appropriate to resolve the objections to personal jurisdiction first. See *Villar*, 990 F.2d at 1494-95.

D.

We would reaffirm today that district courts possess discretion to address challenges to personal jurisdiction before it addresses subject matter jurisdiction. Courts typically should first confirm their subject matter jurisdiction. However, we believe that they may opt instead to resolve defects in personal jurisdiction when the attack

on personal jurisdiction presents a question of federal law that is far more easily resolved than a challenge to subject matter jurisdiction, when the defendant's removal is not frivolous and is made in apparent good faith, and when the challenge to personal jurisdiction does not raise significant issues of state law or the attack on subject matter jurisdiction does. Furthermore, in those situations in which the question of subject matter jurisdiction turns in part upon the presence of personal jurisdiction, it would again be appropriate to resolve the objections to personal jurisdiction first.

Recognizing that district courts possess a level of discretion is enormously preferable to the majority's alternative, a mechanical and rigid ordering of decision-making. We cannot see around corners, nor can we predict the infinite variety of cases that may one day come before our district courts. Rules that lack flexibility are often vices in and of themselves when dealing with trial courts. Given that we are not constitutionally compelled to craft a rigid standard for determining the order in which jurisdictional defects are addressed, we should eschew the invitation to invent one through appellate rulemaking. The very nature of the work of a federal trial judge here makes discretion a value in itself. Relatedly, we must not forget that sequencing, when required, has been by rulemaking, a cooperative enterprise of Congress and of the courts. Indeed, the courts acting alone crafted a set of rules for the exercise of pendent jurisdiction, only to conclude that the enterprise was the task for Congress. See *Finley v. United States*, 490 U.S. 545 (1989).

III.

Thus, we would hold that district courts possess discretion to consider motions challenging personal jurisdiction before those challenging subject matter jurisdiction. The sensible way in which this discretion had operated in our circuit until the panel opinion below is illustrated by the district court's handling of this case.

On the one hand, the plaintiffs' attack on subject matter jurisdiction before the district court raised an issue of first impression in this circuit. Although they challenged subject matter jurisdiction on multiple grounds, the plaintiffs' most troubling arguments were leveled against 9 U.S.C. § 205, which permits removal in cases "relating to" international arbitral agreements. According to the plaintiffs, their case in no way "related to" such an agreement because they were not seeking to enforce the underlying Heimdal Agreement between MPN and Ruhrgas. Ruhrgas, on the other hand, contended that the phrase "related to" pulls more cases into a federal court's removal jurisdiction than just those seeking to enforce the arbitral agreement itself. Disregarding Ruhrgas's other bases for removal, Ruhrgas's invocation of § 205 was certainly not frivolous. Furthermore, considering the mountain of amicus filings before our court criticizing the panel's interpretation of § 205, the plaintiffs' opposition to federal subject matter jurisdiction was a difficult one to address, implicating novel questions of law in this circuit. Finally, the presence of subject matter jurisdiction, at least as it related to diversity, turned in part on the question of the fraudulent joinder of Norge, a foreign corporation, as a plaintiff suing Ruhrgas, another foreign corporation. See *Corporacion Venezolana de Fomento*

v. Vintero Sales Corp., 629 F.2d 786, 790 (2d Cir. 1980) (noting that the presence of aliens on both sides of the case defeats diversity jurisdiction), *cert. denied*, 449 U.S. 1080 (1981). This issue overlapped with the question of personal jurisdiction.⁸ In the end, the issues of subject matter jurisdiction are so complex that the majority opinion declines to address them, despite the full treatment given to them by the panel below. See *Marathon Oil*, 115 F.3d at 318 (describing the subject matter jurisdiction issue as "formidable").⁹

On the other hand, Ruhrgas's challenge to the court's personal jurisdiction was relatively straightforward. Ruhrgas contended that it lacked the requisite minimum contacts with Texas to support jurisdiction from a Texas court. Ruhrgas's motion required the district court only to consider the reach of the Texas long-arm statute, Tex. Civ. Prac. & Rem. Code § 17.042, which is governed by the federal Constitution's Due Process Clause. See *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 200 (Tex. 1985). No substantial questions of purely state law were presented. Accordingly, the federal district court was at least as competent as any state court to decide the personal jurisdictional issue. In addition, as demonstrated

⁸ Norge would have to establish personal jurisdiction over Ruhrgas based on Ruhrgas's contacts with Texas that were pertinent to damaging the value of Norge's licence [sic] to produce Norwegian oil.

⁹ Norge also asserted subject matter jurisdiction based on a federal law of international relations, insofar as Marathon's complaint implicated the actions of sovereign-owned Statoil, the Norwegian gas company.

below, the merits of Ruhrgas's challenge to personal jurisdiction could be resolved relatively easily in its favor.

Thus, the district court, in taking up personal jurisdiction, did not abuse what heretofore had been its discretion. Indeed, the majority does not suggest that it did. Although it parted from standard practice in not first resolving the attack on subject matter jurisdiction, the factors we have outlined above all supported the court's exercise of its discretion.

IV.

In the end, the majority's opinion is nothing more than an exercise in unauthorized judicial rulemaking. In the pursuit of a vindication of its view of federalism principles, the majority withdraws discretion from district courts and replaces it with a rigid sequencing of decisions, despite the absence of any constitutional, statutory, or jurisprudential compulsion to do so. In doing so, the majority ignores the Congress and pays little attention to the host of legal doctrines, from the Due-Process basis of personal jurisdiction to the *Caterpillar* rule to the concept of supplemental jurisdiction, that contradict its new rule of procedure. The Federal Rules of Civil Procedure address the issue of the order in which the defenses of lack of subject matter and lack of personal jurisdiction will be raised. Rules 12(b)(1) and (2) include both as preliminary defenses. The Rules of Civil Procedure regulate in various ways the order of conducting proceedings, including various pre-trial disputes over discovery, summary judgment, and trial itself. The majority does nothing more than pronounce an addendum to

Rule 12(b). This undertaking will rightfully be criticized as an imperial view of judicial roles and a confusion of life tenure with insight. We respectfully dissent.

JAN 21 1999

No. 98-470

CLERK

In The
Supreme Court of the United States

October Term, 1998

RUHRGAS AG,

Petitioner,

v.

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
and MARATHON PETROLEUM NORGE A/S,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether a federal district court is absolutely barred in all circumstances from dismissing a removed case for lack of personal jurisdiction without first deciding its subject-matter jurisdiction?

PARTIES

Petitioner is the German company Ruhrgas AG ("Ruhrgas"). Ruhrgas was the defendant in the underlying action originally filed in Texas state court and removed to the United States District Court for the Southern District of Texas, Houston Division, and was the Appellee and Cross-Appellant in the Fifth Circuit Court of Appeals.

Respondents are Marathon Oil Company, Marathon International Oil Company, and Marathon Petroleum Norge A/S. Respondents were plaintiffs in the underlying litigation and were the Appellants and Cross-Appellees in the Fifth Circuit. Respondents are referred to herein as "the Marathon Plaintiffs."

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Ruhrgas states that no single company owns more than fifty percent of the voting shares of Ruhrgas, but under a temporary contractual relationship, Bergemann GmbH may exercise 59.8 percent of the voting rights. Furthermore, Ruhrgas has no direct non-wholly owned subsidiaries in the United States.

ABBREVIATIONS

J.A.	Joint Appendix
Pet. App.	Appendix to the Petition for Writ of Certiorari
MOC	Marathon Oil Company
MIOC	Marathon International Oil Company
Norge	Marathon Petroleum Norge A/S
MPCN	Marathon Petroleum Company (Norway)
R.	Record on Appeal. Citations to the appellate record will be in the form of: (vol. no.) R. at (page no.). For example, 1 R. at 250 refers to volume 1 of the record at page 250.
Ex.	Exhibits to documents in the appellate record. Some of the exhibits to documents in the record are included in expandable folders. These exhibits were not page numbered by the district clerk. Accordingly, any reference to page numbers will be to those numbers contained in the exhibits. Citations to such exhibits will be in the form of: Ex. (no.) to Doc. (no.) at (page no.). For example, Ex. 1 to Doc. 63 at 53 refers to Exhibit 1 in the folder for exhibits to Document 63 at page 53 of the exhibit.
S.R.	Supplemental Record. The Heimdal Gas Sales Agreement ("HGSA"), filed under seal, and Ruhrgas AG's Notice of Cross-Appeal are included in a supplemental record. The pages of the HGSA were not numbered by the district clerk. The HGSA contains numerous

ABBREVIATIONS – Continued

components, and each component contains individual page numbers. Accordingly, references to the HGSA contained in the Supplemental Record will be to various components of the document and to the page numbers of each part or sub-part, as follows:

- HGSA
- HGSA Appendix A1, A2, A3, B, C, D, E, F, G, H
- HGSA Amendment
- HGSA Amendment – Attachment 1, Attachment 2, Attachment 3

For example, "S.R., HGSA Appendix B at 4" refers to page 4 of Appendix B to the Heimdal Gas Sales Agreement contained in the Supplemental Record.

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OPINIONS AND ORDERS DELIVERED BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Fifth Circuit are reported in *Marathon Oil Co. v. Ruhrgas AG*, 145 F.3d 211 (5th Cir. 1998). Copies of the opinions are annexed to the certiorari petition as Appendix A, and are reprinted in the Joint Appendix ("J.A.") at 473, *et seq.*

The memorandum and order of the United States District Court for the Southern District of Texas granting Ruhrgas's Motion to Dismiss for lack of personal jurisdiction, denying Ruhrgas's Motion for Reconsideration of Order Denying Motion for Stay Pending Arbitration, and denying the Plaintiffs' Motion to Remand and Ruhrgas's Motion to Dismiss on *forum non conveniens* grounds as moot (March 29, 1996) is not reported and is annexed to the certiorari petition as Appendix B, and is reprinted in the Joint Appendix at 436, *et seq.*

The order of the United States District Court for the Southern District of Texas dismissing the action for lack of personal jurisdiction (March 29, 1996) is not reported and is annexed to the certiorari petition as Appendix C, and is reprinted in the Joint Appendix at 455, *et seq.*

 JURISDICTION

The opinion of the United States Court of Appeals was filed on June 22, 1998. Petitioner's petition for writ of certiorari was filed in the Supreme Court on September

18, 1998. Jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. art. III:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States, – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. amend. V:

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. XIV:

Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

I. The Transaction

This case arises out of an international commercial agreement involving the sale of natural gas produced from the Norwegian North Sea. The agreement, which is known as the Heimdal Gas Sales Agreement ("HGSA"), was negotiated in Europe and was executed in Norway in 1984 on the basis of a binding Heads of Agreement signed in 1981. Hoffmann Aff. ¶¶ 3, 8, 6 R. at 113; Sullenbarger Aff. ¶ 2, Ex. 2 to Doc. 39; Hoffmann Depo., Ex. 1 to Doc. 63 at 74-77, 83-85, 88, 90, 280; Enseling Depo., Ex. 4 to Doc. 65 at 51-52. As the seller under the HGSA, Marathon Petroleum Company (Norway) ("MPCN") has sold 70 percent of its share of the Heimdal Field gas production to a group of European companies, including Petitioner Ruhrgas. *Id.* Inasmuch as MPCN had and has no employees, the negotiation and execution of the HGSA and the performance thereunder was and is conducted by personnel of Plaintiffs Marathon Oil Company ("MOC") and Marathon International Oil Company ("MIOC"), MPCN's great-grandparent and grandparent corporations, acting on behalf of MPCN. Evans Depo., Ex. 1 to Doc. 65 at 23-25, 30; Bossley Depo., Ex. 2 to Doc. 65 at 42-43, 45, 48-49, 52-53, 59-60, 77-78. Ruhrgas and the other buyers purchase the gas from MPCN for resale into the European market. Eckert Aff. ¶ 3, 6 R. at 118; Ex. 6 to Doc. 64 ¶ 12. The HGSA contains a Norwegian choice-of-law clause and a broad arbitration clause providing for arbitration in Stockholm, Sweden under the arbitration rules of the International Chamber of Commerce. S.R., HGSA, at 100-02.

II. The Facts

In 1971, the Norwegian Government issued a license to Marathon Petroleum Norge A/S ("Norge"), which was then named Pan Ocean Norge A/S, and three other Norwegian companies "to explore for and produce petroleum" in the Heimdal area, located in the Norwegian North Sea. Ex. 56 to Doc. 64. In the mid-1970s, Norge assigned, by two pass-through agreements, all rights, benefits, obligations, and duties under the production license and a related operating agreement to MPCN, which at that time was named Pan Ocean Oil Corporation (Norway). Exs. 61 & 62 to Doc. 64. By way of these pass-through agreements, Norge transferred to MPCN *all* of its rights to explore for, produce, and sell Heimdal gas. *Id.*; Engzelius Depo., Ex. 3 to Doc. 64 at 59-60. Norge never had any involvement in the production or sale of Heimdal gas nor did it have any contacts or dealings with Ruhrgas. Engzelius Depo., Ex. 3 to Doc. 64 at 108-09.

In early 1981, a "Heads of Agreement" was negotiated exclusively in Europe and executed in Norway, in which MPCN committed to sell 70% of its 24% share of the Heimdal Field gas production to a group of European companies: The German companies Ruhrgas, Brigitta, Thyssengas, and Gelsenberg, the Dutch partly state-owned company Nederlandse Gasunie, the Belgian company Distrigaz, and the French state-owned company Gaz de France (collectively referred to as "Buyers"). Hoffmann Depo., Ex. 1 to Doc. 63 at 74-77, 83-85, 88, 90,

280.¹ The terms of the Heads of Agreement were later incorporated into a more detailed gas sales contract, the HGSA. Hoffmann Depo., Ex. 1 to Doc. 63 at 96.

The HGSA was negotiated exclusively in Europe and was executed by MPCN and the Buyers in Norway on March 2, 1984. Hoffmann Aff. ¶¶ 3, 8, 6 R. at 112-13; Sullenbarger Aff. ¶ 2, Ex. 2 to Doc. 39; Ex. 4 to Doc. 39. During the course of the contractual relationship between MPCN and the Buyers, MPCN and the Buyers held dozens of meetings, all but three of which took place in Europe.² Hoffmann Aff., ¶ 8, 6 R. at 112. A number of issues relating to the HGSA, in particular, the price of the gas and the hardship claims of the Buyers, were the subject of negotiations and disputes. *Id.* at 112. One dispute concerned the validity of the HGSA (including its price provisions), which arose out of the Belgian Government's refusal to approve the HGSA. Hoffmann Depo., Ex. 1 to Doc. 63 at 185. The dispute led to an arbitration proceeding against the Buyers initiated in 1987 by MPCN, which resulted in a September 1989 award favorable to MPCN (except as to its claims against the Belgian company Distrigaz). Hoffmann Aff. ¶ 7, 6 R. at 112; First

¹ Gelsenberg and Distrigaz are no longer among the Buyers. Their share of MPCN's Heimdal quantities has been taken over by other Buyers.

² In 1987, six years after the conclusion of the Heads of Agreement and one year after the commencement of deliveries of gas under the HGSA, the first meeting outside of Europe took place at Marathon's Houston offices. Ex. 2 to Doc. 63; Hoffmann Aff. ¶ 8, 6 R. at 113. Two other meetings (in 1989 and 1990) also were held in Houston. *Id.*

Amended Petition ¶¶ 26-27; J.A. 30. The award was challenged in court in Stockholm by the Buyers other than Distrigaz, Hoffmann Aff. ¶ 7, 6 R. at 112, and the Buyers renewed their claim to entitlement to a price reduction under the hardship provision (Art. 6.8) of the HGSA. S.R., HGSA Amendment at 2. While the Stockholm proceedings were pending, negotiations resulted in a settlement of the parties' disputes, evidenced by an amendment to the HGSA executed in Germany on May 11, 1990, which, *inter alia*, amended the price provisions of the HGSA effective as of 1992. S.R., HGSA Amendment at 3-5 & Attachment 1. Pursuant to the Amendment, the Buyers then withdrew the proceedings challenging the arbitration award. HGSA Amendment at 6; Hoffmann Aff. ¶ 7, 6 R. at 112. Subsequently, MPCN initiated further disputes relating to the price under the amended HGSA, resulting in further negotiations exclusively in Europe until the filing of this lawsuit. Hoffmann Aff. ¶ 7, 6 R. at 112.

III. The Lawsuit

On July 6, 1995, MOC, MIOC, and Norge filed this action against Ruhrgas in a Texas state court. In their lawsuit, the Marathon Plaintiffs allege *inter alia* that Ruhrgas committed fraud by allegedly making misrepresentations in Europe concerning the price to be paid to MPCN for its Heimdal gas. J.A. 21, *et seq.* Although the claims relate to alleged wrongdoing concerning the price paid to MPCN for gas purchased under the HGSA, MPCN is not a plaintiff. The assertion of claims by MOC, MIOC, and Norge – and not MPCN – is a transparent attempt to circumvent the HGSA's arbitration clause. Ruhrgas vehemently denies the allegations.

IV. The Proceedings in the District Court

Ruhrgas timely filed its notice of removal to the United States District Court for the Southern District of Texas. J.A. 42. The removal was based on three independent grounds: (1) the dispute relates to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, and removal jurisdiction therefore exists under 9 U.S.C. § 205; (2) Norge (the only foreign plaintiff) was joined fraudulently and is not a real party in interest, and alienage jurisdiction therefore exists; and (3) the case raises questions of foreign and international relations that are incorporated into and form part of the federal common law. J.A. 43-48.

Ruhrgas then filed a Motion to Dismiss for lack of personal jurisdiction and, subject thereto, a Motion for Stay Pending Arbitration and a Motion to Dismiss on *forum non conveniens* grounds. J.A. 51; 6 R. at 197, 240. The Marathon Plaintiffs filed a Motion to Remand based on an alleged lack of subject-matter jurisdiction. J.A. 93.

The district court ordered discovery pertinent to the jurisdictional issues. J.A. 182. On March 29, 1996, after the parties had completed jurisdictional discovery and briefing, the district court granted Ruhrgas's Motion to Dismiss for lack of personal jurisdiction. J.A. 436, 455. The district court relied on Fifth Circuit authority holding that district courts have the discretion in appropriate circumstances to dismiss on personal-jurisdiction grounds before addressing subject-matter jurisdiction. J.A. 445.

V. The Appeal

On appeal, a three-judge panel of the Fifth Circuit, without reaching the issue of personal jurisdiction, found subject-matter jurisdiction lacking and vacated the judgment of the district court with instructions to that court to remand the case to state court. J.A. 458, *et seq.* After this Court denied Ruhrgas's petition for writ of certiorari, which was limited to the question whether subject-matter jurisdiction existed under 9 U.S.C. § 205, the *en banc* Fifth Circuit, on its own motion, granted rehearing *en banc*, thereby vacating the panel decision. J.A. 472. The case was argued orally to that court on May 18, 1998, and on June 22, 1998, the *en banc* Fifth Circuit, in a 9-to-7 decision, overruled the prior Fifth Circuit precedents relied on by the district court and adopted a mandatory rule requiring district courts to decide subject-matter jurisdiction before personal-jurisdiction in every removed case. 145 F.3d at 215-25, J.A. 477-502, Pet. App. A5-30. The Fifth Circuit vacated the district court's judgment dismissing the case for lack of personal jurisdiction, and remanded the case to the district court with instructions to take up the issue of subject-matter jurisdiction in the first instance.³ 145 F.3d at 225, J.A. 502, Pet. App. A30.

³ The majority opinion states that the three-judge panel's opinion "has been vacated and thus is no longer binding precedent, . . . and we express no opinion on that issue [the question of subject-matter jurisdiction]." 145 F.3d at 225 n.23, J.A. 502, Pet. App. A30.

SUMMARY OF THE ARGUMENT

Two bedrock principles of jurisdiction support the power of a district court to dismiss for lack of personal jurisdiction without first determining its subject-matter jurisdiction. The first is that every district court has jurisdiction to determine its own jurisdiction. *United States v. United Mine Workers*, 330 U.S. 258, 290-91 (1947). The second is that both personal jurisdiction and subject-matter jurisdiction are essential elements of the district court's jurisdiction; if either is lacking, the district court may not adjudicate the merits of the case. *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 381-82 (1937). Given these principles, the question of which jurisdictional issue to address first – subject-matter or personal – is a matter that ought to be left to the sound discretion of the district court in the efficient management of its docket on a case-by-case basis.

Nothing in the Constitution or this Court's prior decisions supports the majority's conclusion that the due-process limitations on a federal court's power somehow are subordinate to the Article III limitations on a federal court's power. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 23 (1998), relied on heavily by the Fifth Circuit, provides no such support. In *Steel Co.*, this Court did not differentiate between subject-matter jurisdiction and personal jurisdiction, but stressed that "the requirement that jurisdiction be established as a threshold matter . . . is 'inflexible and without exception,' " and that " 'without jurisdiction the court cannot proceed at all in any cause.' " *Id.* at 1012 (quoting *Mansfield, C. & L.N.R. Co. v. Swan*, 111 U.S. 379, 382 (1884) and *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). (emphasis added) This Court

repudiated the prior practice of some courts of appeals of " 'assuming' [subject-matter jurisdiction] for the purpose of deciding *the merits*." *Id.* (emphasis added)

As Judge Higginbotham noted in his dissent in this case, there is a "plain lack of relevance" of this principle to the issue presented in this case. 145 F.3d at 228 (Higginbotham, J., dissenting), J.A. 509, Pet. App. A37. Issues that go to the merits of a claim are quite different from issues of jurisdiction. Jurisdiction speaks to the power of the court to adjudicate the claim. A court may lack that power either because it does not have jurisdiction of the subject matter or because it does not have jurisdiction over the person of the defendant. *Employers Reinsurance*, 299 U.S. at 381-82. This Court's decision in *Steel Co.* stands for the sound proposition that before reaching the merits of a case the district court must have "jurisdiction." But "jurisdiction" encompasses both subject-matter jurisdiction and personal jurisdiction. *Steel Co.* simply does not speak to the question of which of two jurisdictional issues must be resolved first.

Federalism concerns do not require that district courts always decide subject-matter jurisdiction before personal jurisdiction in a removed case. The prior court of appeals' decisions addressing the question have properly approached federalism concerns on a case-by-case basis. See *Cantor Fitzgerald L.P. v. Peaslee*, 88 F.3d 152, 155-56 (2d Cir. 1996); *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559, 566-67 (5th Cir. 1993), cert. denied, 510 U.S. 1041 (1994); *Allen v. Ferguson*, 791 F.2d 611, 615 (7th Cir. 1986). In the present case, the personal-

jurisdiction issue is "a relatively simple question of federal law," and "the Plaintiffs' opposition to federal subject-matter jurisdiction was a difficult one to address." 145 F.3d at 231, 233 (Higginbotham, J., dissenting), J.A. 518, 521, Pet. App. A46, 49. Under these circumstances, it is appropriate for a district court to exercise its discretion to decide personal jurisdiction first.

A discretionary rule is consistent with constitutional requirements, gives due consideration to federalism concerns, preserves the flexibility needed by the federal district courts in the management of their caseloads, and promotes judicial efficiency. Given the crowded dockets faced by district judges, the rule adopted by the Fifth Circuit, mandating that the district courts address difficult issues of subject-matter jurisdiction, even when federal law clearly mandates that the case be dismissed for lack of personal jurisdiction, will have a real, practical, and negative effect on the federal district courts. As Justice Breyer noted in his concurring opinion in *Steel Co.*, "to insist upon a 'rigid order of operations' in today's world of federal court caseloads that have grown enormously over a generation means unnecessary delay and consequent added cost." *Steel Co.*, 523 U.S. at ___, 118 S. Ct. at 1021 (Breyer, J., concurring). Although this Court held in *Steel Co.* that the Constitution mandates that district courts decide jurisdictional issues before reaching *the merits*, there is no constitutional, statutory, or jurisprudential justification for a rigid order of decision when a district court is presented with two independent jurisdictional questions.

ARGUMENT

I. A Federal Court's Power to Determine Whether Personal Jurisdiction is Lacking is Not Dependent on the Existence of Subject-Matter Jurisdiction.

A federal court must have jurisdiction to decide the merits of a controversy. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 23, ___, 118 S. Ct. 1003, 1012 (1998). But a court always has jurisdiction to determine its own jurisdiction. *United States v. United Mine Workers*, 330 U.S. 258, 290-91 (1947). Then-Judge Breyer made the critical point in *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 603 (1st Cir. 1988):

This technical argument, however, fails to recognize the protean quality of the word "jurisdiction." Cf. Maitland, "The Shallows and Silences of Real Life," 1 *Collected Papers* 467, 478 (1911). That word, at least sometimes, refers to a relation between a court and a specific type of judicial decision then under consideration. Courts that lack jurisdiction with respect to one kind of decision may have it with respect to another. . . . A court, for example, always has jurisdiction to consider its own jurisdiction.

Judge Easterbrook of the Seventh Circuit made the same point:

"Jurisdiction" is an all-purpose word denoting adjudicatory power. A court may have power to do some things but not others, and the use of "lack of jurisdiction" to describe the things it may not do does not mean that the court is out of business. . . . [A] court has jurisdiction to determine its jurisdiction and therefore may

engage in all the usual judicial acts, even though it has no power to decide the case on the merits.

Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1077-78 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988).

This Court's decision in *Willy v. Coastal Corp.*, 503 U.S. 131 (1992), makes it clear that even though a federal court lacks subject-matter jurisdiction, it can impose sanctions under Civil Rule 11. *Willy*, of course, was a case in which jurisdiction had been asserted on the basis of a federal question, but the same principle applies to diversity cases – e.g., *Chemiakin v. Yefimov*, 932 F.2d 124, 127 (2d Cir. 1991); *Wojan v. General Motors Corp.*, 851 F.2d 969, 971-73 (7th Cir. 1988) – and, as in *Willy* itself, to cases removed to federal court, *Unanue-Casal v. Unanue-Casal*, 898 F.2d 839 (1st Cir. 1990), as much as to cases commenced there.

Rule 11 is only one example of the many things a court can do even if it ultimately is held to lack subject-matter jurisdiction. It can punish for contempt. *United States v. United Mine Workers*, 330 U.S. at 290-95; 13A CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* 2D § 3537 (1984). As Judge Easterbrook's example shows, the court "may supervise discovery, hold a trial, and order the payment of costs at the end." *Szabo Food*, 823 F.2d at 1078.

Applying these principles, the district court had the inherent power to determine its "jurisdiction," which includes both subject-matter jurisdiction and personal jurisdiction. In *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 381-82 (1937), this Court held that a dispute or

controversy is not within the jurisdiction of a federal court if it lacks *either* subject-matter *or* personal jurisdiction. This Court rejected the petitioner's argument that personal jurisdiction was not an essential element of the court's jurisdiction as a federal court, stating:

Each of these elements of jurisdiction was essential, and if any was wanting there was an absence of proper jurisdiction. The defendant was not before the court, and therefore it was without jurisdiction to proceed with the suit. Counsel for the petitioner assumed that the presence of the defendant was not an element of the court's jurisdiction as a federal court; but the assumption is a mistaken one. By repeated decisions in this Court it has been adjudged that the presence of the defendant in a suit *in personam* . . . is an essential element of the jurisdiction of a district . . . court as a federal court, and that in the absence of this element, the court is powerless to proceed to an adjudication.

*Id.*⁴ In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982), this Court confirmed

⁴ That was by no means new learning. In *Illinois Cent. R. Co. v. Adams*, 180 U.S. 28, 34 (1901), this Court wrote:

Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. It exists * * * if the plaintiff be a citizen of one state, the defendant of another, if the amount in controversy exceed \$2,000, and the defendant be properly served with process within the district."

This formulation, expressly equating personal jurisdiction and subject-matter jurisdiction, was quoted with approval in *Venner v. Great Northern Ry. Co.*, 209 U.S. 24, 34 (1908), and in the *Employers Reinsurance* case, 299 U.S. at 382 n.10.

that "the validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter *and* the parties." (emphasis added) A federal court's inherent power to determine its jurisdiction therefore extends to both subject-matter jurisdiction and personal jurisdiction.

Steel Co., relied on heavily by the majority of the Fifth Circuit, is not to the contrary. In *Steel Co.*, this Court did not differentiate between subject-matter jurisdiction and personal jurisdiction, but stressed that "the requirement that *jurisdiction* be established as a threshold matter . . . is 'inflexible and without exception,' " and that " 'without *jurisdiction* the court cannot proceed at all in any cause.' " 523 U.S. at ___, 113 S. Ct. at 1012 (quoting *Mansfield, C. & L.N.R. Co. v. Swan*, 111 U.S. 379, 382 (1884) and *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). (emphasis added) This Court repudiated the prior practice of some courts of appeals of " 'assuming' [subject-matter jurisdiction] for the purpose of deciding *the merits*." *Id.* (emphasis added)

As Judge Higginbotham noted in his dissent, there is a "plain lack of relevance" of this principle to the issue presented in this case. 145 F.3d at 228 (Higginbotham, J., dissenting), J.A. 509, Pet. App. A37. Issues that go to the merits of a claim are quite different from issues of jurisdiction. Because a federal court has the inherent power to determine its own jurisdiction, it is not necessary for the court to assume the existence of subject-matter jurisdiction in order to determine personal jurisdiction. Furthermore, although a federal dismissal for lack of personal jurisdiction precludes a state court from redeciding the

same personal-jurisdiction issue, *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 524-527 (1931), it does not act as an adjudication on the merits. FED. R. CIV. P. 41(b); *Kendall v. Overseas Development Corp.*, 700 F.2d 536, 539 (9th Cir. 1983); cf. *Costello v. United States*, 365 U.S. 265, 284-86 (1960) (dismissal order in question was a dismissal for lack of jurisdiction that did not operate as an adjudication on the merits).

This Court's decision in *Steel Co.* stands for the sound proposition that before reaching the merits of a case the court must have "jurisdiction." But "jurisdiction" encompasses both subject-matter jurisdiction and personal jurisdiction. *Steel Co.* simply does not speak to the question of which of two jurisdictional issues must be resolved first. The district court in this case had the inherent power to determine whether it had personal jurisdiction. The exercise of that power was not dependent on a prior adjudication of the existence of subject-matter jurisdiction.

II. The Constitution Does Not Require a Mandatory Sequencing of Jurisdictional Decisions.

A. The Fifth Circuit's Mandatory Rule Improperly Elevates Subject-Matter Jurisdiction Above Personal Jurisdiction and Erroneously Creates a Hierarchy of Jurisdictional Importance.

"[W]hen presented with two jurisdictional questions, the Court may choose which one to answer first." *Steel Co.*, 523 U.S. at ___, 118 S. Ct. at 1021 (Stevens, J., concurring). The Fifth Circuit held this pragmatic rule of judicial management inapplicable, elevating subject-matter jurisdiction above personal jurisdiction "in some hierarchy of

jurisdictional importance." 145 F.3d at 228 (Higginbotham, J., dissenting), J.A. 509, Pet. App. A37. As noted by Judge Higginbotham in his dissent, that conclusion is "untenable." *Id.* As discussed above, both subject-matter jurisdiction and personal jurisdiction are essential elements of a federal court's jurisdiction. *Employers Reinsurance*, 299 U.S. at 381-82; *Insurance Corp. of Ireland*, 456 U.S. at 701. Both are rooted in core constitutional precepts – subject-matter jurisdiction in Article III and personal jurisdiction in the Due Process Clause. *Insurance Corp. of Ireland*, 456 U.S. at 702.

The fact that personal jurisdiction may be waived does not mandate that subject-matter jurisdiction always be decided before personal jurisdiction. Waiver does not apply in the context of subject-matter jurisdiction because Article III limitations "serve institutional interests that the parties cannot be expected to protect." *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 851 (1986). On the other hand, the due-process limitation on personal jurisdiction "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Insurance Corp. of Ireland*, 456 U.S. at 702. Although the differences between the "institutional interests" underlying subject-matter jurisdiction requirements and the "individual liberty interests" underlying personal-jurisdiction requirements permit waiver of personal jurisdiction, but not subject-matter jurisdiction, those differences do not render the Article III limitations on jurisdiction of greater importance than due-process limitations, nor do they require a mandatory sequencing of jurisdictional decisions. If personal jurisdiction is challenged, a federal court must analyze both subject-matter

jurisdiction and personal jurisdiction before reaching the merits. Nothing in the Constitution or this Court's prior decisions mandates that a court faced with both personal and subject-matter jurisdiction challenges must always decide subject-matter jurisdiction first.

B. Federalism Considerations Do Not Require a Mandatory Sequencing of Jurisdictional Decisions.

The Fifth Circuit concluded that federalism issues require a mandatory sequencing of jurisdictional decisions in removed cases. The court held that a decision by a federal district court on personal jurisdiction in a removed case before reaching removal jurisdiction constitutes a "usurpation of the state courts' residual jurisdiction to adjudicate the personal jurisdiction question. . . ." 145 F.3d at 219, J.A. 486, Pet. App. A14.

In attempting to justify its "usurpation" theory, the Fifth Circuit reasoned that "in the removal context, where the plaintiff chose state court, that court's interests in adjudicating the issue of personal jurisdiction, absent federal subject-matter jurisdiction, must be given special consideration." 145 F.3d at 219 n.11, J.A. 486, Pet. App. A14. That reasoning, however, cannot be reconciled with the decision of a unanimous Court in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996). In that case, the district court lacked complete diversity upon removal, and it erroneously overruled the plaintiff's objection to subject-matter jurisdiction. However, the lack of complete diversity later was cured by the dismissal of a nondiverse defendant following a settlement. After trial and a judgment

adverse to the plaintiff, the Sixth Circuit vacated the judgment based on the absence of subject-matter jurisdiction at the time the case was removed. In this Court, the plaintiff argued that the Sixth Circuit correctly vacated the judgment in order to preserve the plaintiff's choice of a state-court forum. *Id.* at 75. This Court rejected that argument and reversed the Sixth Circuit, noting that although the plaintiff's arguments were not without merit, they were overridden by "considerations of finality, efficiency, and economy." *Id.* at 75-77. Notwithstanding that the case should have been tried on the merits in state court, and notwithstanding that the plaintiff was deprived of his choice of a state-court forum, this Court affirmed the district court's judgment based on those "overriding" considerations. *Id.*⁵ Yet, the Fifth Circuit's mandatory rule prohibits any weighing of those considerations.

That is not to say that federalism concerns are not relevant to the exercise of a federal court's discretion in determining which jurisdictional issue to take up first. To the contrary, in *Allen v. Ferguson*, 791 F.2d 611 (7th Cir. 1986), the Seventh Circuit properly held that on the facts of that case, federalism concerns required a decision on subject-matter jurisdiction before reaching personal jurisdiction, based on the nature of the issues presented and their relative difficulty. Specifically, the court held that

⁵ *Caterpillar* is an example of what Judge Higginbotham described in his dissent: "[I]t is inevitable in our dualistic but hierarchical system of federal and state courts that the state courts will occasionally, for efficiency's sake, be deprived of the opportunity to pass on certain matters otherwise available to them." 145 F.3d at 231, J.A. 518, Pet. App. A46.

"federalism concerns tip the scales in favor of ruling on the motion to remand" because in ruling on the personal-jurisdiction challenge made in that case, "the district court was required to delve into difficult questions of Illinois law," and the subject-matter jurisdiction challenge presented "a federal question of at least equal, if not less, difficulty. . . ." *Id.* at 616.

On the other hand, in *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559, 566-67 (5th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994), the court affirmed the district court's dismissal of a defendant for lack of personal jurisdiction, even though it found subject-matter jurisdiction lacking on the facts of that case. The court held that federalism concerns did not require reversal because the removal was not frivolous and the personal-jurisdiction challenge in that case raised purely federal constitutional issues. "[F]ederal intrusion into state courts' authority" therefore was "minimized." *Id.*

In *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155-56 (2d Cir. 1996), the Second Circuit noted that federalism concerns may require a decision on subject-matter jurisdiction before personal jurisdiction when the personal-jurisdiction issue presents a question of state law. The court nevertheless held that the district court properly dismissed the case for lack of personal jurisdiction under New York law without reaching subject-matter jurisdiction. *Id.* The court noted that it was "clear that the court did not have personal jurisdiction under New York law" and that the subject-matter jurisdiction challenge presented a "more difficult question" of state law. *Id.*

These cases illustrate that federal district courts can analyze federalism concerns in exercising their discretion on a case-by-case basis, subject to review by the appellate courts on an abuse-of-discretion standard. The fact that federalism concerns require that subject-matter jurisdiction be determined before personal jurisdiction in *some* removed cases does not justify the Fifth Circuit's non-discretionary rule requiring a particular sequencing of jurisdictional decisions in *all* removed cases regardless of the circumstances.

This Court has adopted a similar case-by-case analysis of federalism considerations in the abstention context. In *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), this Court explained the principle underlying its abstention doctrines:

Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, or the administration of a specialized scheme for liquidating embarrassed business enterprises, or the final authority of the state court to interpret doubtful regulatory laws of the state. These cases reflect a doctrine of abstention appropriate to our federal system, whereby the federal courts 'exercising a wide discretion' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary.

312 U.S. at 500-501. (citations omitted) The power to dismiss under the abstention doctrines derives from the discretion enjoyed by courts of equity. *Quackenbush v.*

Allstate Insurance Co., 517 U.S. 706, 727 (1996). This Court described the parameters governing the exercise of that discretion in *Quackenbush*:

[The] exercise of this discretion must reflect 'principles of federalism and comity.' Ultimately, what is at stake is a federal court's decision, based on a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the 'independence of state action' that the State's interests are paramount and that a dispute would best be adjudicated in a state forum.

Id. (citations omitted)

In applying its abstention doctrines, this Court has emphasized that the resolution of abstention questions requires an analysis of the federalism considerations presented by a particular case. For example, in *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) ("*NOPSI*"), this Court held that under the *Burford* doctrine, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar" or when the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Id.* (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). The Court in *NOPSI* went on to note that the mere existence of a complex state administrative process or a potential

for conflict with state regulatory law or policy is not sufficient for *Burford* abstention; there must be undue federal interference with such a process presented by the facts of the particular case. *Id.* at 362.

This Court similarly has held that district courts must consider federalism issues on a case-by-case basis in determining whether to exercise jurisdiction over supplemental state-law claims. As this Court noted in *City of Chicago v. International College of Surgeons*, 522 U.S. 156, — 118 S. Ct. 523, 534 (1997):

Depending on a host of factors, then – including the circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between the state and federal claims – district courts may decline to exercise jurisdiction over supplemental state law claims. . . . [W]hen deciding whether to exercise supplemental jurisdiction 'a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity.'

This Court's abstention and supplemental-jurisdiction decisions demonstrate that federalism considerations properly are evaluated by district courts on a case-by-case basis in deciding whether to retain jurisdiction. All of this illustrates the importance of the point Justice Black made when he defined "Our Federalism" in *Younger v. Harris*, 401 U.S. 37, 44 (1971):

The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The

Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National governments. . . .

A district court faced with both subject-matter and personal-jurisdiction challenges in a removed case should be permitted to analyze federalism considerations in light of the circumstances of the particular case, the nature of the issues presented, and the state interests at stake in exercising discretion as to which jurisdictional issue to take up in the first instance.

As shown, there is no constitutional, statutory, or jurisprudential basis for a rule requiring a mandatory sequencing of jurisdictional decisions in removed cases. Ruhrgas respectfully submits that this Court should reject the Fifth Circuit's mandatory rule requiring that district courts resolve subject-matter jurisdiction challenges before personal-jurisdiction challenges in every removed case and instead approve the discretionary rule applied by the federal courts prior to the Fifth Circuit's decision in this case. Familiar principles should guide the district courts in exercising their discretion in determining which jurisdictional question – subject-matter or personal – should be addressed first. The district court should consider whether the removal was frivolous. *Asociacion Nacionale*, 988 F.2d at 566-67. The district court should consider whether the personal-jurisdiction issue involves difficult questions of state law. *Id.*; *Allen*, 791 F.2d at 616; *Cantor Fitzgerald*, 88 F.3d at 155. The district court should analyze the relative difficulty and complexity of the personal-jurisdiction and subject-matter jurisdiction issues. *Allen*, 791 F.2d at 616; *Cantor Fitzgerald*, 88 F.3d at 155. In

that regard, the district court should consider whether the court necessarily will be required to resolve any personal-jurisdiction issue in deciding the subject-matter jurisdiction question. *See, e.g., Villar v. Crowley Maritime Corp.*, 990 F.2d 1489 (5th Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994). In short, the district court should have the discretion to weigh all aspects of efficiency, economy, and comity in determining which of the jurisdictional challenges to take up first. This exercise of discretion should be reviewed on an abuse-of-discretion standard.

III. A Discretionary Rule Provides Flexibility to the District Courts in the Management of their Dockets and Promotes Judicial Efficiency.

District courts around the country are struggling to deal adequately with the vast numbers of cases brought before them. The rule announced by the majority of the court below requires district courts to resolve questions of subject-matter jurisdiction, no matter how complex and difficult they may be,⁶ whenever that jurisdiction is

⁶ A significant number of subject-matter jurisdiction issues are enormously difficult and potentially protracted and may require the resolution of factual issues, *e.g.*, complete preemption, federal common law, fraudulent joinder. And it often is necessary for the federal courts to pass on state-law issues in order to determine their subject-matter jurisdiction. Fraudulent-joinder cases are but one example of this. The court must look to state law in determining the elements of a controversy in order to decide whether the jurisdictional amount is present. *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 352-353 (1961). And though federal law ultimately decides whether an absent party is "indispensable" so that its joinder would defeat jurisdiction, it is state law that, in a diversity case,

challenged in the more than 30,000 civil cases (as of fiscal 1997)⁷ that are removed to federal court, even when the law clearly mandates that the case be dismissed for lack of personal jurisdiction. Since it is not obvious that there is a principled basis on which that rule can be confined to removed cases,⁸ it might well extend to the more than

determines what interest the outsider actually has. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 125 n.22 (1968).

⁷ In fiscal 1997, there were 30,715 civil cases removed from state court to federal court and 209,124 original filings in the district courts. REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 44 (1997).

⁸ 145 F.3d at 230 n.5 (Higginbotham, J., dissenting), J.A. 514, Pet. App. A42.

Suppose a diversity case commenced in federal court in which defendant moves to dismiss for want of personal jurisdiction and lack of subject-matter jurisdiction. The federal court would be required to apply state standards in deciding the personal-jurisdiction issue. *Arrowsmith v. United Press Intl.*, 320 F.2d 219 (2d Cir. 1963); 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1075 (1987). If the court decided the personal-jurisdiction question first, and dismissed on that ground, this would prevent plaintiff from bringing the same suit in the state court in that state, because the federal holding of no personal jurisdiction would be preclusive in the state case. *Insurance Corp. of Ireland*, 456 U.S. at 702 n.9. It is true that in this example plaintiff would not be deprived of a state forum it preferred, but the federal decision would still have denied the state courts what the majority below thought to be their entitlement "to their own, independent - and absent a controlling Supreme Court decision - even conflicting interpretation of their state's long-arm statute and of the minimum contacts requirements of the federal Due Process Clause." 145 F.3d at 218, J.A. 485, Pet. App. A13.

200,000 civil cases commenced in the district courts each year.⁹

The Fifth Circuit's rule is not in keeping with traditional notions of judicial restraint, pursuant to which federal courts should not reach out to resolve complex and controversial questions when a decision may be based on a narrower or more easily decided ground. *See, e.g., Moor v. County of Alameda*, 411 U.S. 693, 715 (1973), in which this Court refused to decide "a subtle and complex question with far-reaching implications" because the case could be resolved on a simpler issue. And, as noted by Justice Breyer in his concurring opinion in *Steel Co.*, "[t]he Constitution does not impose a rigid judicial 'order of operations,' when doing so would cause serious practical problems. . . . [T]o insist upon a rigid 'order of operations' in today's world of federal court case loads that have grown enormously over a generation means unnecessary delay and consequent added cost." 523 U.S. at ___ 118 S. Ct. at 1021 (Breyer, J., concurring). Yet, the Fifth Circuit's mandatory rule does just that, adversely affecting the district courts' ability to manage their dockets efficiently.

In rejecting a flexible rule, the Fifth Circuit relied on its conclusion that "[a] discretionary rule may also create incentives for defendants to subvert the orderly scheme for removing cases by acting opportunistically," *i.e.*, by "manufactur[ing] a convoluted theory of federal subject-

⁹ See note 7, *supra*.

matter jurisdiction . . . and then tak[ing] advantage of a stricter interpretation of personal-jurisdiction requirements in federal court. . . . " 145 F.3d at 219, J.A. 486-87, Pet. App. A14-15. A virtually identical argument was rejected by this Court in *Caterpillar*. The plaintiff in *Caterpillar* argued that if the federal-court judgment against him were allowed to stand, "defendants will have an enormous incentive to attempt wrongful removals." 519 U.S. at 77. This Court rejected the argument, holding that it

rests on an assumption we do not indulge – that district courts generally will not comprehend, or will balk at applying, the rules on removal Congress has prescribed. . . . The well-advised defendant, we are satisfied, will foresee the likely outcome of an unwarranted removal – a swift, and non-reviewable remand order, attended by the displeasure of a district court whose authority has been improperly invoked. The odds against any gain from a wrongful removal, in sum, render improbable [plaintiff's] projection of increased resort to the maneuver.

Id. at 77-78. (citations omitted)

Applying the rationale of *Caterpillar*, the Fifth Circuit's projection of maneuvering by defendants to remove cases to federal court improperly to take advantage of federal-court interpretations of personal-jurisdiction requirements is "improbable" and does not justify a mandatory rule that strips the district courts of the discretion to manage removed cases in the most efficient manner.

IV. This Case Exemplifies the Propriety of a Discretionary Rule and the Proper Exercise of Discretion by a Federal District Court to Decide Personal Jurisdiction First.

This case illustrates the merit of adopting a discretionary rule permitting district courts in appropriate circumstances to decide personal jurisdiction first in removed cases. This case also provides an example of the proper exercise by a district court of that discretion.

A. The District Court's Threshold Determination of Personal Jurisdiction Promoted Judicial Efficiency.

1. The Personal Jurisdiction Question Was Resolved Easily in Ruhrgas's Favor.

In its Motion to Dismiss, Ruhrgas contended that it lacked the requisite minimum contacts with Texas to support the exercise of jurisdiction by a Texas court. J.A. 51-92. Because the Texas long-arm statute, TEX. CIV. PRAC. & REM. CODE § 17.042, like that of many states, extends to the full reach of the Constitution's Due Process Clause, *Kawaski Steel Corp. v. Middleton*, 699 S.W.2d 199, 200 (Tex. 1985), only the federal due-process issue was raised by the motion. J.A. 60-86.

The district court correctly determined that the due-process issue was straightforward and that personal jurisdiction in Texas clearly was lacking. The seven dissenting Fifth Circuit judges agreed, concluding that "as demonstrated below, the merits of Ruhrgas's challenge to personal jurisdiction could be resolved relatively easily in its favor." 145 F.3d at 233 (Higginbotham, J., dissenting), J.A.

522-23, Pet. App. A50-51. The simplicity of the personal-jurisdiction question is illustrated by the brief discussion of the pertinent facts set forth below.

The Marathon Plaintiffs' claims arise from a purely European transaction. The natural gas is produced from the Heimdal Field located in the Norwegian North Sea. First Amended Petition, 6 R. at 54-55, ¶¶ 14, 15, J.A. 25-26. The "Heads of Agreement," which was signed in 1981 and concerned the sale of gas to the Buyers in Europe, was negotiated and executed in Europe. Hoffmann Depo., Ex. 1 to Doc. 63, at 74-77, 83-85, 90; Hoffmann Aff., ¶ 4, 6 R. at 113. The negotiations leading to the execution in 1984 of the HGSA (the more detailed agreement contemplated in the Heads of Agreement) were conducted in Europe. Hoffmann Aff. ¶ 8, 6 R. at 111-12; Sullenbarger Aff. ¶ 2, Ex. 2 to Doc. 39; Ex. 4 to Doc. 39. The HGSA was signed in Europe. *Id.* Dozens of meetings were held during the course of the contractual dealings, all but three of which were held in Europe. Hoffmann Aff. ¶ 8, 6 R. at 111-12. The HGSA expressly provides that it is governed by Norwegian law, and it provides for arbitration in Stockholm, Sweden. S.R., HGSA, at 100-02. The gas is resold in Europe. Eckert Aff. ¶ 3, 6 R. at 117; Ex. 6 to Doc. 64 at ¶ 12. Most of the payments for the gas were made to MPCN in Europe. Hoffmann Aff. ¶ 4, 6 R. at 113. No payments were made in Texas. *Id.*

Europe was the focus of the transactions and activities out of which this lawsuit arises. In fact, the Marathon Plaintiffs expressly allege in their First Amended Petition that Ruhrgas's alleged wrongful acts "were (and are) part of a single ongoing plan aimed at controlling the

Western European gas market. . . ." First Amended Petition, 6 R. at 47, ¶ 34, J.A. 33. (emphasis added) Ruhrgas could not have reasonably anticipated that it would be haled into court in Texas to defend against claims arising out of its purchase of Norwegian gas for resale in Europe, based on allegations of wrongful conduct purportedly designed to monopolize the Western European gas market. Personal jurisdiction in Texas therefore does not exist. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (ultimate inquiry is whether defendant's contacts with the forum are such that it should reasonably anticipate being haled into court there). This conclusion would be inevitable even in the absence of the HGSA's Norwegian choice-of-law clause and the arbitration clause providing for arbitration in Sweden. However, these clauses buttress the district court's conclusion that it lacked personal jurisdiction over Ruhrgas. See *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1069 (5th Cir.), cert. denied, 506 U.S. 867 (1992); *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1029 (5th Cir. 1983), cert. denied, 466 U.S. 962 (1984). The "mere fortuity" of the presence of MOC and MIOC in Texas¹⁰ provides no basis for a contrary conclusion. *Jones v. Petty-Ray*, 954 F.2d at 1069; *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 773 (5th Cir. 1988); *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 778 (5th Cir. 1986), cert. denied, 481 U.S. 1015 (1987).

In the district court, MOC and MIOC relied on three meetings held at Marathon's offices in Houston. J.A. 229-34. The first Houston meeting occurred in 1987, more

¹⁰ Sometime after MPCN committed to sell the gas to the Buyers in the Heads of Agreement, MOC and MIOC moved their offices from Ohio to Texas. 3 R. at 992 n.11, J.A. 239.

than six years after execution of the Heads of Agreement and one year after the commencement of deliveries of gas under the HGSA. Ex. 2 to Doc. 63. The other two Houston meetings took place in 1989 and 1990. *Id.* As correctly noted by the district court, "[t]he plaintiffs' designated representative who attended all three of the Houston meetings . . . was unable to recall any discussion at the Houston meetings concerning the funding arrangement between the Plaintiffs and MPCN," and "was not even able to recall any false statements made by Ruhrgas at the Houston meetings." J.A. 449, Pet. App. B14.¹¹ Furthermore, it was undisputed that the meetings in Houston were between Ruhrgas and the other Buyers and Marathon representatives acting on behalf of MPCN,¹² and that the meetings concerned the HGSA,¹³ which was governed by Norwegian law and which contained an arbitration clause providing for arbitration in Sweden. The district court correctly concluded that "Ruhrgas was in Houston due to the contract with MPCN and could only expect to have to engage in arbitration in Sweden." J.A. 450, Pet. App. B15.

¹¹ See Bossley Depo., Ex. 2 to Doc. 65 at 61-63.

¹² Plaintiffs' designated representative confirmed in his deposition that in all of the meetings, the Marathon personnel were acting on behalf of MPCN, which had no employees of its own. Bossley Depo., Ex. 2 to Doc. 65 at 42-43, 45, 48-49, 52-53, 59-60, 77-78. He described the first Houston meeting as "a meeting . . . between representatives of the consortium and individuals who would have been there representing Marathon Petroleum Company (Norway)." *Id.* at 42-43. The witness similarly confirmed that the Marathon representatives attended the other two meetings on behalf of MPCN. *Id.* 53-54, 59-60.

¹³ Ex. 2 to Doc. 63.

With respect to Norge's claims, the personal-jurisdiction question likewise was easily resolved in Ruhrgas's favor. It is undisputed that Ruhrgas never dealt with or contacted Norge. Engzelius Depo., Ex. 3 to Doc. 64 at 108-09. Norge alleged that Ruhrgas damaged the value of a Norwegian production license. J.A. 33. Norge's claims are grounded on (1) alleged participation by Ruhrgas in alleged breaches by Statoil (Norway's 100% state-owned oil company) of purported fiduciary duties allegedly arising out of the Heimdal Field operating agreement, and (2) alleged tortious interference with MPCN's efforts to secure other European buyers for Heimdal gas. J.A. 35-38. Norge is a European corporation headquartered in Norway. Engzelius Depo., Ex. 3 to Doc. 64 at 12-15, 18-20; Engzelius Decl. ¶ 3, 5 R. at 307. There is no "Texas connection" to Norge's claims and the Marathon Plaintiffs never have asserted any Texas connection to those claims.

These facts demonstrate that "the merits of Ruhrgas's challenge to personal jurisdiction could be resolved relatively easily in its favor." 145 F.3d at 233 (Higginbotham, J., dissenting), J.A. 523, Pet. App. A51.

2. The Subject-Matter Jurisdiction Challenge Raised Difficult Questions.

In contrast, the subject-matter jurisdiction questions presented by the notice of removal and the motion to remand raised difficult and complex issues of law. For example, one of Ruhrgas's bases for removal of the case was its contention that Norge (the only alien plaintiff) was fraudulently joined to defeat federal jurisdiction. J.A.

299-316. Ruhrgas's fraudulent-joinder argument was based in part on the fact that Norge assigned its rights under the Heimdal field production license to MPCN in the 1970s, retaining only the possibility of reacquiring an interest in the license at some future date in the event of a default by MPCN. J.A. 299-308. Norge's chief executive officer and general manager acknowledged that Norge has not held the rights to explore for, produce, and market Heimdal gas since the assignment of the rights under the production license to MPCN in the 1970s.¹⁴ He also acknowledged that the rights to the license may never revert to Norge.¹⁵ As the extensive briefing filed in the district court demonstrates,¹⁶ the proper classification of Norge's alleged reversionary interest was important to the state-law question¹⁷ whether Norge holds a sufficient interest to entitle it to sue for any alleged damage to the license. The three-judge Fifth Circuit panel that originally decided the appeal concluded that these questions concerning the proper characterization of Norge's alleged property interests were "difficult." 115 F.3d at 319, J.A. 466.

¹⁴ Engzelius Depo., Ex. 3 to Doc. 64 at 59-60.

¹⁵ *Id.* at 59-60, 85-91.

¹⁶ See J.A. 299-308, 355-66.

¹⁷ The Fifth Circuit panel noted that the resolution of this question may require application of Norwegian law. 115 F.3d at 319, J.A. 466. However, "[i]n the absence of sufficient proof to establish with reasonable certainty the substance of the foreign principles of law, the modern view is that the law of the forum should be applied." *Cantieri Navali Riuniti v. M/V Skyptron*, 802 F.2d 160, 163 n.5 (5th Cir. 1986) (quoting *Symonette Shipyards Ltd. v. Clark*, 365 F.2d 464, 468 (5th Cir. 1966)).

Ruhrgas's removal also was grounded on its contention that Plaintiffs' claims relate to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2115, 330 U.N.T.S. 38 (the "Convention"), and that removal jurisdiction therefore exists under 9 U.S.C. § 205. J.A. 43-46. Although the district court determined that Plaintiffs were not bound to arbitrate their claims, 4 R. at 607, that determination is not dispositive of the removal-jurisdiction question presented by Section 205. The statute provides for jurisdiction over claims which are "related to" an arbitration agreement falling under the Convention. 9 U.S.C. § 205. Judge Higginbotham noted in his dissent that a "mountain" of *amicus* filings was submitted to the Fifth Circuit on the Convention issue,¹⁸ that it "raised an issue of first impression in this circuit," and that the question was "a difficult one to address, implicating novel questions of law in this circuit." 145 F.3d at 233 (Higginbotham, J. dissenting), J.A. 521, Pet. App. A49.

Additionally, Ruhrgas relied on the federal common law as an additional basis for federal jurisdiction. J.A. 47-48, 316-24. Ruhrgas contended that Plaintiffs' claims raise substantial questions of foreign and international relations. *Id.* For example, the First Amended Petition alleges that Ruhrgas conspired with Statoil, the 100% state-owned Norwegian oil company, to monopolize the

¹⁸ See the Fifth Circuit docket entries at J.A. 17-19. The Federal Republic of Germany also submitted an *amicus curiae* brief to the district court that addressed jurisdiction under 9 U.S.C. § 205. J.A. 206-11.

Western European gas market. J.A. 22-25, 33. Plaintiffs allege that Statoil "negligently misrepresented or fraudulently misrepresented" facts and committed "breaches of fiduciary duties." J.A. 32, 36-7. These allegations call into question official Norwegian policy decisions concerning Norwegian natural resources. At the time this case was pending in the district court in 1995 and early 1996, there was little precedent providing clear guidance on the resolution of those issues.¹⁹ See J.A. 321-24, 366-70.

3. The Subject-Matter Jurisdiction Challenge Necessarily Required the District Court to Address Personal Jurisdiction.

The foregoing discussion demonstrates that the district court properly concluded that it was far more efficient to resolve the personal-jurisdiction question than the subject-matter jurisdiction issues presented by the

¹⁹ Shortly before the issuance of the panel opinion in this case, the Fifth Circuit decided *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997), which addressed the circumstances in which the federal common law of foreign relations will be applied by the federal courts. In *Torres*, the Fifth Circuit held that the federal common law applied to the action because it struck "at Peru's sovereign interests by seeking damages for activities and policies in which the government has been actively engaged." *Id.* at 543. Although the panel opinion in this case rejected this basis for jurisdiction based on the intervening decision in *Torres* (without the benefit of briefing on the issue by the parties), the panel failed to address the First Amended Petition's direct allegations of wrongful conduct by an arm of the Norwegian government. 115 F.3d at 320, J.A. 466-68. The *en banc* Fifth Circuit vacated the panel's conclusions with regard to subject-matter jurisdiction and they are no longer binding. 145 F.3d at 225, n.23, J.A. 502, Pet. App. A30.

motion to remand, and that considerations of economy and efficiency favored a dismissal of the case for lack of personal jurisdiction without reaching the difficult subject-matter jurisdiction questions. Yet, an additional efficiency concern supported the district court's exercise of its discretion. The question of personal jurisdiction as to Norge's purported claims overlapped with the fraudulent-joinder issue raised by Ruhrgas in support of subject-matter jurisdiction. In a case against a foreign defendant, an important part of a fraudulent-joinder analysis is whether there is any possibility that the foreign defendant - Ruhrgas - may be subject to personal jurisdiction in the forum state on the claims of the foreign plaintiff - Norge. See, e.g., *Nolan v. Boeing Co.*, 736 F. Supp. 120, 122-23 (E.D. La. 1990). Considerations of judicial economy and efficiency are particularly compelling when, as in this case, the personal-jurisdiction analysis is relevant to the district court's determination of subject-matter jurisdiction. *Villar*, 990 F.2d at 1494 (upholding exercise of discretion when "the district court must necessarily address the issue of personal jurisdiction regardless of which motion it addresses first"). The relevance of the Norge personal-jurisdiction question to the fraudulent-joinder analysis provides further support for the district court's exercise of discretion to reach personal jurisdiction first in this case.

B. Federalism Concerns Did Not Require the District Court to Decide Subject-Matter Jurisdiction First.

Every relevant consideration in the federalism analysis supports the district court's exercise of discretion in

this case. Unlike *Allen v. Ferguson*, 791 F.2d at 616, there were no difficult issues of state law raised by Ruhrgas's personal-jurisdiction challenge. Ruhrgas's motion to dismiss under Rule 12(b)(2) raised only federal due-process issues. J.A. 60-86. Therefore, "federal intrusion into state courts' authority" was "minimized." *Asociacion Nacional*, 988 F.2d at 566-67. Not only was Ruhrgas's removal not frivolous, it raised subject-matter jurisdiction issues that all sixteen judges of the Fifth Circuit characterized as novel. 145 F.3d at 225, J.A. 502, Pet. App. A30; 145 F.3d at 233 (Higginbotham, J. dissenting), J.A. 521, Pet. App. A49. As in *Cantor Fitzgerald*, 88 F.3d at 155-56, the personal-jurisdiction issue was more easily resolved than the issues raised by the motion to remand. As in *Villar*, 990 F.2d at 1494, resolution of the subject-matter jurisdiction questions necessarily would have required the district court to address personal jurisdiction as to Norge's claims. Under these circumstances, federalism concerns "run up against . . . overriding . . . considerations of . . . efficiency and economy" that are "overwhelming." *Caterpillar*, 519 U.S. at 75.

CONCLUSION

For the foregoing reasons, Ruhrgas prays that the judgment of the Fifth Circuit be reversed and that the Judgment of the district court be affirmed,²⁰ or in the

²⁰ Ordinarily the appropriate disposition would appear to be a remand to the Fifth Circuit to determine if the district court erred in finding no personal jurisdiction. But here it is so clear that personal jurisdiction does not exist that all seven of the

alternative, that the case be remanded to the Fifth Circuit for further proceedings.

Respectfully submitted,

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Fifth Circuit judges who looked at the simplicity of the personal-jurisdiction question concluded that "as demonstrated below, the merits of Ruhrgas's challenge to personal jurisdiction could be resolved relatively easily in its favor." 145 F.3d at 233 (Higginbotham, J., dissenting), J.A. 522-23, Pet. App. A50, 51.

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No. 98-470

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

RUHRGAS, A.G.,
v. *Petitioner,*

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
AND MARATHON PETROLEUM NORGE A/S,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

In a case properly filed in state court and removed by the defendant to federal court, may a district court ignore a challenge to federal subject matter jurisdiction, conduct discovery, and enter an order of dismissal without first ruling on a motion to remand for lack of subject matter jurisdiction?

RULE 29.6 DISCLOSURE

Marathon Oil Company is a subsidiary of USX Corp. Marathon International Oil Company is wholly-owned by Marathon Oil Company. Marathon Petroleum Norge A/S is a Norwegian corporation whose stock is held by a wholly-owned affiliate of Marathon International Oil Company.

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No. 98-470

RUHRGAS, A.G.,
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MARATHON INTERNATIONAL OIL COMPANY,
AND MARATHON PETROLEUM NORGE A/S,
*Respondents.*On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

A. Factual Background

On July 6, 1995, Respondents Marathon Oil Company ("Marathon"), Marathon International Oil Company ("MIOC"), and Marathon Petroleum Norge ("Norge") filed this case in Texas state court, alleging conspiracy, fraud, and participation in a breach of fiduciary duty. Marathon and MIOC alleged that Petitioner Ruhrgas, A.G. ("Ruhrgas") defrauded them into loaning hundreds of millions of dollars for

the development of the Heimdal gas field, which is located in the North Sea. These allegations were based on misrepresentations and fraudulent omissions contained in hundreds of letters sent by Ruhrgas to Marathon and MIOC in Houston, Texas over a multi-year period. Ruhrgas officials also traveled to Marathon's Houston, Texas headquarters for three in-person meetings concerning the gas field matter.

Norge is a Norwegian corporation and an affiliate of Marathon and MIOC. It owns the production license for the Heimdal field. Norge alleges that the value of its license has been diminished by Ruhrgas' refusal to permit the sale of Heimdal gas to *any* buyers except members of Ruhrgas' cartel, known as the "Consortium." Norge also alleges that Ruhrgas participated with its joint venture partner, Statoil (the Norwegian oil and gas company), in breaches of fiduciary duties Statoil owed to Norge. These matters, too, were the subject of the three in-person Houston meetings and numerous correspondence directed to Respondents in Texas.

Respondents' claims arise from, or directly relate to, deliberate contacts by Ruhrgas with the forum state—Texas. Furthermore, Ruhrgas has maintained employees in Houston for many years. None of Respondents' claims present a federal question; instead, they are garden-variety tort claims arising under Texas law.

B. Procedural History

After Respondents filed this lawsuit in Texas state court, Ruhrgas removed the case to federal district court for the Southern District of Texas on August 21, 1995. A week later it filed, among many other

motions, a motion to stay pending arbitration based on an arbitration clause contained in a contract between Ruhrgas and Marathon Petroleum Company (Norway), a non-party affiliate of the Marathon Respondents. On September 15, 1995, Respondents filed a Motion to Remand, raising the absence of federal subject matter jurisdiction.

Respondents asked the district court to stay all activity in the case until it had considered its subject matter jurisdiction, urging that a simple facial examination of the pleadings revealed no basis for federal removal jurisdiction. J.A. 137. Ruhrgas then sought an order staying consideration of subject matter jurisdiction until it had conducted "discovery" in support of its notice of removal and in connection with its assertion that the court lacked personal jurisdiction. The court withheld a ruling on the remand question and permitted Ruhrgas to conduct the requested discovery. Thereafter, on November 17, 1995, the court, noting the absence of any arbitration agreement between the parties, denied Ruhrgas' motion to stay pending arbitration. The alleged existence of such an agreement had been Ruhrgas' principal argument in support of federal subject matter jurisdiction. Nevertheless, on March 29, 1996, the district court entered an order dismissing the case for lack of personal jurisdiction and denying as moot the motion to remand.

Respondents and Ruhrgas both appealed to the Fifth Circuit. On June 10, 1997, a Fifth Circuit panel found that Ruhrgas (a) had not met its burden of showing an agreement to arbitrate, (b) had not shown fraudulent joinder, and (c) had not shown that the suit raised a federal question by virtue of the federal common law of international relations. Thus,

there was no subject matter jurisdiction. The court remanded the case to the state court from which it was improvidently removed. This Court denied *certiorari* on November 10, 1997, but the Fifth Circuit voted to rehear the case *en banc*.

On *en banc* rehearing, the Fifth Circuit limited itself to the question whether a federal district court may dispose of a case on a Rule 12(b)(2) motion challenging personal jurisdiction without addressing whether it had subject matter jurisdiction under Article III and the governing statutes. Concluding that subject matter jurisdiction is a threshold issue, the court remanded to permit the district court to determine whether such jurisdiction existed. Claiming this ruling presented a conflict with the Second Circuit, Ruhrgas again sought *certiorari*. This Court granted the Petition on December 7, 1998.

SUMMARY OF ARGUMENT

This case exemplifies why federal subject matter jurisdiction must be determined as a threshold issue. This action was filed in a Texas state court, by two Texas residents and an alien, asserting claims based on Texas law arising from conduct occurring, in significant part, in Texas. Four years later, the case remains stuck in a federal procedural quagmire, and no federal court ever has found a basis for subject matter jurisdiction. To say, as Ruhrgas does, that such a result is compelled by judicial "efficiency" is outrageous.

Federal courts are courts of limited jurisdiction, deriving their judicial authority from Article III of the Constitution. This constitutional grant of authority involves two important principles: (1) The scope of federal subject matter jurisdiction is limited by

Article III itself; and (2) Authority to determine the jurisdiction of inferior federal courts within that scope is delegated to Congress. These two principles are deeply rooted in notions of federalism. The concerns they reflect become especially pronounced when a litigant attempts to remove a case from state to federal court. For a federal court sitting in a removed case to ignore a challenge to its authority over the subject matter simply because the court believes it might be "easier" or "more efficient" is irreconcilable with the fundamental allocation of judicial power within our federal system.

For every case originally filed in federal court, the first and fundamental question the court must address is whether it possesses constitutional and statutory subject matter jurisdiction over the case. And this threshold question is even more important in cases removed from state courts, for if it even "appears" that the answer is negative, the case "shall" be remanded promptly. The inquiry may not always be "easy," but difficulty of decision is no substitute for subject matter jurisdiction, and federal law provides an answer for difficult cases: all doubts must be resolved in favor of remand. To further minimize interference with the state courts, the federal removal statutes were drafted to render a remand order unappealable. Following remand, of course, the state court is fully capable of deciding all other issues in the case, including questions—whether easy or hard—about the reach of the state's long-arm statute.

Ruhrgas argues that the approach it advocates would promote efficiency in the administration of the federal courts. This argument is flawed in at least two respects. First, Ruhrgas' approach would in fact be *inefficient* for a number of reasons, especially given

the multi-factor analysis that would ensue whenever a federal court was asked to ignore its subject matter jurisdiction. Second, and more fundamentally, the approach contemplates that the most basic limitation on federal court authority, which goes to the core of the allocation of judicial power between the federal government and the states, may be ignored in the name of administrative efficiency.

ARGUMENT

I. THE SIGNIFICANCE OF ARTICLE III AND THE MADISONIAN COMPROMISE

The delicate balance of state and federal court authority that would be upset by Ruhrgas' proposals should be viewed in light of the compromise that first gave rise to "national" courts. While the framers of the Constitution had little difficulty authorizing a federal judiciary—albeit a judiciary of carefully limited subject matter jurisdiction—the Constitutional Convention hotly debated the desirability of establishing inferior federal courts. Indeed, before the Convention, there were only very limited national courts.¹ The controversy reflected the basic constitu-

¹ For instance, Article IX of the Articles of Confederation authorized a mechanism to resolve certain disputes between the states. That procedure was rarely invoked. See RICHARD H. FALLON ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 6 n.31 (4th ed. 1996) [hereinafter "HART & WECHSLER"]; John P. Frank, *Historical Bases of the Federal Judicial System*, 13 *LAW & CONTEMP. PROBS.* 3, 8 & n.32, 33 (1948). Article IX also authorized the Congress to appoint courts to try piracies and felonies on the high seas. State courts invariably were appointed for this purpose. Appeals from these courts were heard by a national judicial body—at first a Congressional committee and then "The Court of Appeals in Cases of Capture." HART & WECHSLER at 6-7; Frank, 13 *LAW & CONTEMP. PROBS.* at 8 n.32.

tional tension about the allocation of powers between the states and the new federal government.

Proponents of increased national power ("Nationalists") led by James Madison and Edmund Randolph, proposed a clause establishing a "National Judiciary . . . to consist of one or more supreme tribunals, and of inferior tribunals."² The first clause created little controversy, but there was a "strong sentiment" against the creation of inferior federal courts of original jurisdiction. Frank, 13 *LAW & CONTEMP. PROBS.* at 10. Many at the Convention wished to leave "all litigation at the trial stage to the state courts." *Id.* John Rutledge, speaking for a group of delegates adverse to expanded national power, flatly opposed the creation of any lower federal courts, saying: "State tribunals might and ought to be left in all cases to decide in the first instance, the right to appeal to the supreme national tribunal being sufficient to secure the national rights and uniformity of judgments." 1 *RECORDS OF THE FEDERAL CONVENTION* at 124.³

Despite Madison's spirited defense of inferior federal courts, Rutledge's motion to eliminate them prevailed. Madison responded with a compromise that would authorize Congress to create inferior federal courts and, by necessary implication, to limit their subject matter jurisdiction within the confines of

² Madison's journal record from May 29, 1787 session, in 1 *RECORDS OF THE FEDERAL CONVENTION* at 21 (Max Farrand ed. 1937) (emphasis added).

³ Roger Sherman of Connecticut apparently agreed. He added that inferior courts would prove to be too costly. HART & WECHSLER at 8; 1 *RECORDS OF THE FEDERAL CONVENTION* at 124-25.

Article III.⁴ After more spirited debate,⁵ the Madisonian Compromise, as it came to be known, eventually carried the day.

The authority delegated to Congress by the Madisonian Compromise was implemented by the Judiciary Act of 1789,⁶ which established a system of inferior federal courts with specific jurisdiction. The Judiciary Act fell short of vesting federal jurisdiction to the full extent allowed by Article III.⁷ Subsequent congressional actions have redefined federal jurisdiction, first expanding and then, for the last century,

⁴ 1 RECORDS OF THE FEDERAL CONVENTION at 125. And some delegates may have understood the language of the compromise to enlist state courts for "national purposes" rather than create new "national" courts. James F. Liebman & William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 717 (1998); see also Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 120 ("The practice of appointing state courts as federal courts, common at the time of the Convention, may therefore have been understood by some delegates as the natural reference of the Compromise's language . . .").

⁵ Pierce Butler of South Carolina argued that the establishment of lower federal courts would cause the states to "revolt at such encroachments." 1 RECORDS OF THE FEDERAL CONVENTION at 125.

⁶ Act of Sept. 24, 1789, 1 Stat. 73.

⁷ Congress never has conferred the full jurisdictional power of Article III to the lower federal courts. *E.g.*, *Owen Equip. and Erection Co. v. Kroger*, 437 U.S. 365, 371-74 (1978); see also HART & WECHSLER at 32. Most of the history of successive Judiciary Acts since the 1789-1802 period is a study in careful drafting of boundaries to, and the placement of limitations on, federal district court jurisdiction.

generally restricting the scope of federal trial court authority.⁸ Throughout this history, however, Congress has carefully balanced states' rights against federal power by specifically defining and restricting the jurisdictional reach of federal courts. *E.g.*, *Plaque-mines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 514-15 (1898); *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941). Fundamental to this balance is the principle that federal courts may not act without power over the case. Indeed, by 1883, this Court had recognized a "presumption" that lower federal courts were *without* subject matter jurisdiction over the case "unless the contrary affirmatively

⁸ To be sure, federal district court jurisdiction as delineated in the Judiciary Acts has seen periods of growth. Reconstruction Congresses enacted a series of statutes extending the jurisdiction of the federal courts, and as HART & WECHSLER state, "[m]ost sweepingly, the Judiciary Act of 1875 conferred on the federal judiciary a general jurisdiction over all cases 'arising under' federal law." *Id.* at 86. However, as federal judicial business exploded, "Congress finally responded to the crisis with the Judiciary Acts of 1887-88, which put a series of curbs on access to the lower federal courts," and thereby substantially fixed the framework of the contemporary federal system. *Id.* at 37.

Since the 1887-88 Acts, the general trend has been for Congress to be careful about lower federal court jurisdiction. For instance, in the *Lochner* era, Congress proceeded to rein in lower federal court jurisdiction as a result of federal courts engaging in "broader and potentially more intrusive scrutiny of state and federal legislation." *Id.* at 38. Since that time, apart from jurisdictional grants in newly-created federal causes of action, the most significant changes with respect to lower federal court jurisdiction appear to have been increases in the amount-in-controversy requirements for diversity cases and the elimination of such requirements in federal question cases. *Id.*

appears." *Grace v. American Century Ins. Co.*, 109 U.S. 278, 283-84 (1883).

Thus the Constitution left to Congress two basic determinations: whether to establish inferior federal courts, and the extent of their subject matter jurisdiction (within the limited authority conferred by Article III). This constitutional decision is especially significant to this case. It means that the threshold issue of federal judicial competence includes both the question whether the case falls within Article III itself and the question whether Congress has in fact authorized the exercise of federal judicial authority in the particular case. An affirmative answer to both questions is required in order to satisfy the limits imposed by the founders and to ensure that the interests of the states are properly protected. Judge Smith and a majority of the Judges serving on the Fifth Circuit correctly determined that without such an affirmative answer, a federal district court cannot proceed.

II. THE EXISTENCE OF FEDERAL SUBJECT MATTER JURISDICTION IS A PRELIMINARY AND NECESSARY THRESHOLD QUESTION

Mindful of these historical considerations, this Court consistently has observed that federal subject matter jurisdiction is a threshold consideration. *E.g.*, *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1012-13 (1998). Without such jurisdiction over a case, an inferior federal court "cannot proceed at all." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869). Rather, "the only function" properly available to a court without federal subject matter jurisdiction "is announcing that fact and dismissing [or in a removed case, remanding] the cause." *Id.*

This restriction springs directly "from the nature and limits of the judicial power of the United States" embodied in the Madisonian Compromise. *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884).

Indeed, this Court has long recognized that if a federal district court assumes the power to act in a case where Congress has not authorized inferior court action, it violates Article III, the Compromise that led to it, and more generally, the "power reserved to the states under the Constitution." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). This concept of subject matter jurisdiction is not at all "protean" and is fundamentally different from other matters that have been denominated "jurisdictional," such as personal jurisdiction (including amenability to service of process) or improper venue.⁹ Federal courts, as opposed to state courts, may reach the issues in a case only if there is *both* constitutional and statutory authority for subject matter jurisdiction.

Because of their unusual nature, and because it would not simply be wrong but indeed would be an unconstitutional invasion of the powers reserved to the states if federal courts were to entertain cases not within their jurisdiction, the rule is well settled that the party seeking to in-

⁹ See HART & WECHSLER at 1583-85. *Ruhrgas*, at pp. 21-24 of its brief, invokes decisions of this Court dealing with questions of abstention and supplemental jurisdiction to support its argument that the federal courts have discretion to bypass questions of subject matter jurisdiction when convenience dictates. But those cases could not be more inapposite. They all involve instances in which subject matter jurisdiction exists, and the question is whether, as a matter of carefully confined discretion, considerations of federalism warrant a discretionary decision *not* to exercise that jurisdiction, at least before a state court has had an opportunity to act.

voke the jurisdiction of a federal court must demonstrate that the case is within the competence of that court.¹⁰

This rule is not new—it is precisely the compromise Madison envisioned. As this Court recently observed in *Steel Co.*: “This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. . . . The requirement that jurisdiction be established as a threshold matter ‘spring[s] from the nature and limits of the judicial power of the United States’ and is ‘inflexible and without exception.’ ”¹¹ Whether a statutory grant of subject matter jurisdiction can or should be considered before addressing the ultimate reach of Article III might be debatable; however, *Steel Co.* confirms that subject matter jurisdiction under Article III must be present *at the threshold*.¹² *E.g.*, *Steel Co.*, 112 S. Ct. at 1022 (Stevens, J., concurring). The point, as reflected in the Madisonian Compromise, Article III and the Tenth Amendment, is that *both* Article III *and* congressional authorization to act must be present before an inferior court may assume power over

¹⁰ *Marathon Oil Co. v. Ruhrgas, A.G.*, 145 F.3d 211, 216 (5th Cir. 1998) (en banc) (quoting 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3522, at 61-62 (2d ed. 1984)) (emphasis added by the court).

¹¹ *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1012 (1998) (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)). Ruhrgas' citation of *Steel Co.*, Pet. Brief at 15, as referring to both subject matter jurisdiction and personal jurisdiction is incorrect since the case (and the quotation) plainly refer *only* to subject matter jurisdiction.

¹² *E.g.*, *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76-77 (1941); *Shamrock Oil & Gas Corp.*, 313 U.S. at 108-09; *Healy*, 292 U.S. at 270.

the case and reach any issue other than subject matter jurisdiction.

The rule to which this Court has adhered for more than 100 years remains in effect today.¹³ In every federal case, the “first question” necessarily is that of subject matter jurisdiction, for if Congress has not granted such jurisdiction to the inferior courts, “it is useless, if not improper, to enter into any discussion of other questions.” *Ex parte McCardle*, 74 U.S. at 515. So primary is this single issue that even on writ of error or appeal, “the first and fundamental question is that of jurisdiction.” *Mansfield*, 111 U.S. at 382.¹⁴

¹³ Ruhrgas' reliance (pp. 18, 19, 28, 38) on *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), is wholly misplaced. In that case, this Court held that even if subject matter jurisdiction was lacking when the district court erroneously denied a motion to dismiss, a decision on the merits should be upheld so long as subject matter jurisdiction *did* exist at the time judgment was rendered. This holding has no bearing on the question whether a federal court may properly ignore a continuing lack of subject matter jurisdiction in order to reach and decide other issues in the case.

Similarly irrelevant in the present case are this Court's decisions, discussed at pp. 13-15 of Ruhrgas' brief, holding that a federal court has “jurisdiction to determine jurisdiction” and may take whatever action is appropriate (including the issuance of discovery orders and contempt sanctions) with respect to the making of that determination. Of course, a court must have such authority; it does not follow, however, that a federal court also has authority to take actions *unrelated* to the proper determination of subject matter jurisdiction or *unnecessary* to preserve the status quo while it undertakes that task.

¹⁴ The “purity” of Article III jurisdiction remains unalloyed when the balance of state and federal authority is at stake. None of the “dilution” cases cited in *Steel Co.* challenged state court original jurisdiction.

III. THE NEED TO DETERMINE SUBJECT MATTER JURISDICTION AT THE THRESHOLD IS ESPECIALLY EVIDENT IN REMOVED CASES

The necessity of determining federal subject matter jurisdiction at the outset exists in every case. In the removal context, however, the underlying principles of federalism become especially important. Pursuant to 28 U.S.C. § 1446, a defendant may remove a case from a state court simply by filing a Notice of Removal in the appropriate federal district court. Once the defendant files a copy of the notice with the clerk of the affected state court, federal law commands "the State court shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d). The simplicity of this procedure, however, offers a potential for abuse well beyond the imagination of anyone at the Constitutional Convention.¹⁵ Accordingly, Congress and the federal courts have placed strict limits on removal to maintain federalism's delicate balance.

A. Statutory Limits On Removal Protect The Plaintiff's Choice Of Forum And Reflect The Threshold Nature Of Subject Matter Jurisdiction

Congress first authorized removal in the Judiciary Act of 1789 and, since that time, has restricted removal jurisdiction and placed firm guidelines on the procedure to curb abuse. To prevent improvident

¹⁵ See generally Charles Alan Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 203 (1969) (decrying "outrageous practice" of stopping a state court "in its tracks by a frivolous petition for removal").

removal it has established several safeguards. The first is the primacy of federal subject matter jurisdiction: "If at any time before final judgment it appears that the district court lacks *subject matter jurisdiction*, the case *shall be remanded*." 28 U.S.C. § 1447(c) (emphasis added).¹⁶ Such language in a jurisdictional statute "creates an obligation impervious to judicial discretion." *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 962 (1998) (citing *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)). Indeed, this Court has observed that "the literal words of § 1447(c) . . . give no discretion to dismiss rather than remand an action." The statute declares that, where subject matter jurisdiction is lacking, the removed case '*shall be remanded*.'" *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991). The body of precedent from this Court commanding all federal courts to scrutinize assiduously subject matter jurisdiction at each stage of litigation—trial and appellate—and to dismiss cases not prop-

¹⁶ This concept is mirrored in Fed. R. Civ. P. 12(h)(3), which provides: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action." Not surprisingly, lack of subject matter jurisdiction is the first defense listed in Rule 12(b). And as noted in one leading treatise: "[W]hen a [Rule 12(b)] motion is based on more than one ground, the court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined." 5A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 1350, at 209-10 (2d ed 1990).

erly before them is overwhelming.¹⁷ Likewise, the courts of appeals have embraced this concept as an imperative, holding that the appropriate course (even on appeal) is to examine for subject matter jurisdiction constantly and, if it is found lacking, to order remand to the state court.¹⁸

The second congressional safeguard stresses the finality of a remand for lack of subject matter jurisdiction, underscoring the notion that because state courts are the repositories of general jurisdiction, a remand cannot harm the defendant: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise" 28 U.S.C. § 1447(d).¹⁹ This bright line rule applies "no matter how plain the legal error." *Bris-*

¹⁷ See, e.g., *Cutler v. Rae*, 48 U.S. (7 How.) 729 (1849); *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379 (1884); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908); *Mitchell v. Maurer*, 293 U.S. 237 (1934); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Philbrook v. Glodgett*, 421 U.S. 707 (1975); *Juidice v. Vail*, 430 U.S. 327 (1977); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

¹⁸ See, e.g., *Ziegler v. Champion Mort. Co.*, 913 F.2d 228 (5th Cir. 1990); *Liberty Mut. Ins. Co. v. Ward Trucking Corp.*, 48 F.3d 742 (3d Cir. 1995).

¹⁹ In most cases involving a remand, state courts will have concurrent jurisdiction. In the very rare instance of a remand of a case in which federal subject matter jurisdiction is exclusive, an objection to state court authority over the subject matter may be made on remand and, if denied, may then be made the subject of a certiorari petition in this Court. Of course in the present case, there is no doubt of the state court's jurisdiction over the subject matter.

coe v. Bell, 432 U.S. 404, 414 n.13 (1977).²⁰ As this Court has pointed out, the rule was intended to avoid "prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *United States v. Rice*, 327 U.S. 742, 751 (1946).

As a final check, Congress has strictly drafted the removal statute to limit a defendant's right to remove. Although federal question cases are generally removable, diversity cases may be removed only if none of the defendants resides in the state in which the suit was filed originally. See 28 U.S.C. § 1441(b). A defendant may remove a case only within 30 days from the time it becomes removable, or the opportunity to remove is lost. See 28 U.S.C. § 1446(b). Congress also authorized the entry of fee awards against a removing defendant where removal is later determined to have been improvident—even if the removal was made in good faith. See, e.g., 28 U.S.C. § 1447(c); *News Texan, Inc. v. City of Garland*, 814 F.2d 216, 220 (5th Cir. 1987). As the Eleventh Circuit has observed, such restrictions confirm that the plaintiff's choice of forum and the defendant's right to remove are not "on equal footing." *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994).

B. Judicial Limits On Removal Require Strict Statutory Construction And Resolution Of All Doubts In Favor Of Remand

As noted above, Congress has not been alone in checking abuse of the removal mechanism. Under this Court's guidance, the federal judiciary has been

²⁰ A defendant may appeal a remand based on something other than a lack of subject matter jurisdiction. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 344-45 (1976). This, again, demonstrates that the subject matter jurisdiction inquiry is qualitatively different.

careful to ensure that the limitations on federal judicial authority embodied in Article III and the Madisonian Compromise are respected and that the lower federal courts confine themselves to cases in which Congress has authorized them to proceed, leaving all other cases to the state courts. *E.g.*, *Healy*, 292 U.S. at 269-71. The courts have been especially cautious in the removal context. As this Court stressed in its unanimous *Shamrock Oil* decision, "the power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution." 313 U.S. at 108-09. This policy, noted the Court, requires *strict construction* of the removal statutes. *Id.*

The courts of appeals have consistently read the removal statutes strictly so as to require lower federal courts "scrupulously to confine their own jurisdiction to precise statutory limits."²¹ In cases where the plaintiff and defendant clash over subject matter jurisdiction, the courts of appeals require that all doubts be resolved in favor of remand.²² Accordingly,

²¹ *Ahern v. Charter Township*, 100 F.3d 451, 454 (6th Cir. 1996); *see also, e.g.*, *American Home Assurance Co. v. Insular Underwriters Corp.*, 494 F.2d 317, 319 (1st Cir. 1974); *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674, 678 (2d Cir. 1990); *Brown v. Francis*, 75 F.3d 860, 864-65 (3d Cir. 1996); *In re Lowe*, 102 F.3d 731, 734-35 (4th Cir. 1996); *Cook v. Weber*, 698 F.2d 907, 909 (7th Cir. 1983); *International Assoc. of Entrepreneurs of Am. v. Angoff*, 58 F.3d 1266, 1270 (8th Cir. 1995); *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996); *In re Bear River Drainage Dist.*, 267 F.2d 849, 851 (10th Cir. 1959); *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994).

²² *See, e.g.*, *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368 (11th Cir. 1998); *Transit Cas. Co. v. Certain Underwriters*

where the subject matter jurisdiction question is "difficult," the federal judiciary already has devised a simple but effective means of resolving the issue: remand.

IV. IGNORING SUBJECT MATTER JURISDICTION IS NEITHER CONSTITUTIONAL NOR EFFICIENT

Despite the established rule that doubts as to subject matter jurisdiction be resolved in favor of remand, Ruhrgas offers this Court a new solution: permit the federal district court to ignore "difficult" issues of subject matter jurisdiction if ruling on an "easier" personal jurisdiction question would dispose of the case. Ruhrgas argues that this approach is justified in the name of judicial efficiency because it gives federal courts more discretion to dispose of a case, and it spares state courts from having to rule on personal jurisdiction issues.²³ Like "futility jurisdiction"²⁴ and "hypothetical jurisdiction,"²⁵ however, there is simply no constitutional, statutory or policy support for Ruhrgas' new concept of "efficiency jurisdiction." *Cf.* 28 U.S.C. § 1447(c).

at Lloyd's of London, 119 F.3d 619 (8th Cir. 1997); *Brown v. Francis*, 75 F.3d 860 (3d Cir. 1996); *Vasquez v. Alto Bonito Gravel Plant Corp.*, 56 F.3d 689 (5th Cir. 1995); *Boyer v Snap-on Tools Corp.*, 913 F.2d 108 (3rd Cir. 1990).

²³ Under Ruhrgas' view, even "easy" questions apparently are a "burden" for state court judges.

²⁴ *See International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 88-89 (1991) (remanding case to state court for lack of subject matter jurisdiction pursuant to mandatory language of § 1447(c) despite argument that remand would be futile).

²⁵ *See Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1012-13 (1998) (holding subject matter jurisdiction could not be assumed through "hypothetical jurisdiction" in order to reach a dispositive merits question).

A. Subject Matter Jurisdiction Is Fundamentally Different From All Other Categories Of Jurisdiction

Ruhrgas argues at some length that because its amenability to service of process is a personal jurisdiction question, a federal district court should be free to choose which "jurisdictional" issue to entertain first. But the banner of "jurisdiction" can be flown over a variety of issues and defenses that might eventually arise in a case.²⁶ Only a court with subject matter jurisdiction *over the case*, however, has the power to decide any of them. "Neither personal jurisdiction nor venue is fundamentally preliminary in the sense that subject-matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979).

The idea of "efficiency jurisdiction" ignores the critical distinction between subject matter and personal (or any other) jurisdiction. As this Court explained in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*:

²⁶ *E.g.*, *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (treating sovereign immunity as "jurisdictional"); *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330-31 (1991) (holding conduct reached by antitrust laws was a "jurisdictional" issue); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (addressing and ultimately rejecting argument that filing period under statute was "jurisdictional"); *Bank One v. United States*, 157 F.3d 397, 402-03 (5th Cir. 1998) (treating limitations under Quiet Title Act as "jurisdictional"). Justice Breyer's opinion for the Court in *Wisconsin Department of Corrections v. Schacht*, 66 U.S.L.W. 4531 (U.S. June 22, 1998) demonstrates that jurisdictional defenses, such as personal jurisdiction or, as in that case, the Eleventh Amendment, are considered after jurisdiction over the case.

Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. "[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record."

None of this is true with respect to personal jurisdiction.

456 U.S. 694, 702 (1982) (emphasis added and citations omitted).

Unlike subject matter jurisdiction,²⁷ personal jurisdiction can be conferred by agreement,²⁸ can readily

²⁷ *E.g.*, *Steel Co.*, 118 S. Ct. at 1012-13; *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 & 1228-29 (9th Cir. 1989) (stressing that federal subject matter jurisdiction is presumed to be lacking and also stressing that, unlike personal jurisdiction, subject matter jurisdiction requirement cannot be conferred by contract or waived).

²⁸ *Stock West*, 873 F.2d at 1228-29.

be waived by the defendant²⁹ and can be pretermitted by the court until trial when it overlaps with a decision on the merits.³⁰ Such a defense has no better claim to being considered in advance of the question of who has the power over the case than any of the other issues that might be said to have "jurisdictional" significance.³¹

B. Deciding Other Issues Without Subject Matter Jurisdiction Deprives State Courts Of Their Residual Jurisdiction

When a federal court acting without subject matter jurisdiction dismisses a case for lack of personal jurisdiction, it impermissibly wrests that decision from the state courts.³² Pursuant to their residual

²⁹ *E.g.*, *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 729 (2d Cir. 1998); *FED. R. CIV. P.* 12(h) (1).

³⁰ *E.g.*, *Data Disc, Inc. v. Systems Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977).

³¹ The Second and Fifth Circuits have required federal district courts to address a challenge to its jurisdiction over the case before reaching a personal jurisdiction defense. *See, e.g.*, *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674, 678 (2d Cir. 1990); *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 215 (5th Cir. 1998) (en banc); *see also Nichols v. Southeast Health Plan*, 859 F. Supp. 553, 559 (S.D. Ala. 1993) ("A federal court lacking subject matter jurisdiction cannot rule on other pending motions.") (citing *In re Bear River Drainage Dist.*, 267 F.2d 849 (10th Cir. 1959)).

³² Although a dismissal for lack of personal jurisdiction is not a decision having "claim preclusive" effect, such a decision will have "issue preclusive" effect, *i.e.*, it will preclude relitigation of the issue of personal jurisdiction in a subsequent action on the same claim governed by the same law. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. b and illus. 3 (1982).

(and general) jurisdiction, state courts are entitled to interpret *both* their own long-arm statute *and* (subject to this Court's review) the minimum contacts requirement of the federal Due Process Clause.³³ *See Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 216 (5th Cir. 1998) (en banc). As Justice Harlan put it: "Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States. . . ." *Robb v. Connolly*, 111

³³ State courts invariably have a special interest in interpreting and applying their own long-arm statutes. Indeed, the long-arm statutes in some states do not reach even to the limits of the Due Process Clause. *See, e.g.*, *American Investors Life Ins. Co. v. Webb Life Ins. Agency*, 876 F. Supp. 1278, 1280 (S.D. Fla. 1995). And the availability of long-arm statutes in other states is restricted to certain individuals. *See, e.g.*, *American Int'l Pictures, Inc. v. Morgan*, 371 F. Supp. 528, 531 (D. Miss. 1974) (recognizing that Mississippi's long-arm statute is available only to state residents). These differences reflect more than technical nuances; they exemplify the kinds of policy decisions that should be left to state courts. *Cf. Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 440-41 (1952). As this Court recognized in *Colorado v. Symes*, "it is axiomatic that the right of the states, consistently with the Constitution and laws of the United States, to make and enforce their own laws is equal to the right of the federal government to exert exclusive and supreme power in the field that by virtue of the Constitution belongs to it." 286 U.S. 510, 518 (1932).

Moreover, only at its limits does a state's long-arm statute implicate federal due process questions. Of course, any state procedure, at its limits, can present such a question. Nonetheless, these still are all fundamentally questions of state law. *Cf. Burnham v. Superior Court*, 495 U.S. 604 (1990) (plurality).

U.S. 624, 637 (1884); see also *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Ruhrgas now asks the Court to sacrifice the states' right to decide disputes within their power on the altar of efficient judicial administration.

C. "Efficiency Jurisdiction" Would Be Inefficient And Invite Abuse

The discretionary approach Ruhrgas advocates supposedly is "efficient" because (1) it frees a federal district court from having to address a "difficult" subject matter jurisdiction issue, and (2) it frees a state court from having to address an "easy" personal jurisdiction issue. But degree of difficulty cannot create the authority to decide an issue, even in the name of efficiency. See *Steel Co.*, 118 S. Ct. at 1012-13. And, as a practical matter, "difficult" questions of subject matter jurisdiction are so rare as to render the argument virtually moot.

The fact is that while this issue [of federal question jurisdiction] raises fascinating intellectual problems, and provides marvelous examination questions for law professors to use, in practice it is of almost no significance. I doubt if I see as many as one reported decision a year in which there is any serious question whether the case is or is not within federal question jurisdiction. In the real world almost all cases fall within stereotyped patterns for which the answer is perfectly clear.³⁴

³⁴ Charles Alan Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 201 (1969). "Federal courts should not displace state responsibility and choke the federal judicial docket on the basis of federal concerns that in truth are only 'imag-

Nevertheless, Ruhrgas urges a multi-factor "efficiency" test that would add extraordinary uncertainty to the process and lend itself to continuing controversy.³⁵ According to Ruhrgas, the factors that appear to be relevant to this approach include (but are not necessarily limited to) the following: (1) Is the question of subject matter jurisdiction "harder" than the question of personal jurisdiction? (2) Is the question of subject matter jurisdiction one involving a limitation of federal authority under Article III itself, or one arising under a statute? (3) Is the question of personal jurisdiction one of federal law under the due process clause or of state long-arm law? (4) Is the claim of subject matter jurisdiction made in good faith? (5) Which issue, if either, would, or might, require the court to look into the merits of the case? Given the need to examine these and other questions under Ruhrgas' approach, the costs of a "discretionary," multi-factor approach clearly exceed the benefits.³⁶

inary.'" *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 685-86 (1982) (Powell, J., dissenting, joined by Berger, C.J., Rehnquist and O'Connor, J.J.).

³⁵ Ruhrgas' efficiency arguments fail to account for any of the practical considerations of the rule's application. The test advocated by the Fifth Circuit dissent in this case incorporates a series of factors that would authorize an inferior court to ignore the question of subject matter jurisdiction. It did not suggest that these factors would be exclusive or offer any predictable means of determining the weight given to each of the factors. It could take years, if not decades, to bring any predictability to a new legal standard of jurisdictional "efficiency."

³⁶ Cf. ZECHARIAH CHAFEE, JR., *SOME PROBLEMS OF EQUITY* 312 (1950) ("The boundary between judicial power and nullity should also, if possible, be a bright line, so that very little

Finally, any imagined efficiency resulting from Ruhrgas' new theory would evaporate the moment a federal district court makes the wrong decision. This case provides the perfect illustration:

Respondents filed a state court petition stating claims arising only under Texas tort law. The face of their pleading raised no federal questions, and diversity jurisdiction was lacking.³⁷ The claims were based, in part, on actions Ruhrgas made while physically present in Texas during meetings with Marathon specifically related to the subject matter of the litigation. The claims also were based on more than 100 letters and telexes sent by Ruhrgas to Marathon and MIOC in Texas, and described a fraud-based conspiracy that specifically targeted Respondents in Texas. Had the parties remained in state court, there would have been no briefing on federal subject matter jurisdiction at all, and any personal jurisdiction challenges could have been decided by the state court.

Instead of pursuing this undeniably efficient path, Ruhrgas chose to remove the case to federal court, necessarily making the process more complex and less efficient. Making arguments it now admits were "novel," Ruhrgas asserted federal question jurisdiction on the basis of an international convention that

thought is required to enable judges to keep inside it."). To the same effect, see Wright, *supra* note 34, at 187.

³⁷ Clearly, Ruhrgas would have preferred that this case had been filed by Respondents' affiliate as a breach of contract action. The plaintiff, however, is the master of the claims, and if it chooses not to assert a federal claim, even if one is available, the defendant cannot remove on the basis of a federal question. See *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987); CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 229 (5th ed. 1994).

did not apply according to its own terms,³⁸ and the supposed federal common law of international relations.³⁹ Ruhrgas also claimed that Norge had been fraudulently joined as a plaintiff,⁴⁰ even though Norge unquestionably owns the production license for the Heimdal field and is claiming Ruhrgas' actions damaged the value of that interest. All of these novel

³⁸ The Convention on the Enforcement of Foreign Arbitral Awards only applies in cases where there is a written arbitration agreement between the parties. See 3 U.S.T. 2517; *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 334-35 (5th Cir. 1987); see also 9 U.S.C. § 202 (requiring dispute to be between parties with an arbitration agreement that is within the reach of the Federal Arbitration Act). Affidavits attached to the removal papers proclaimed "Ruhrgas AG has never entered into any agreement with any of the plaintiffs concerning . . . any matters which are the subject of the First Amended Petition." J.A. 121.

³⁹ This Court never has recognized such a basis for federal subject matter jurisdiction. If any such basis exists, however, a private commercial dispute between corporations residing in different countries is patently insufficient to invoke it. See *Aquafaith Shipping, Ltd. v. Jarillas*, 963 F.2d 806, 809 (5th Cir. 1992).

⁴⁰ Removing a non-diverse case from state to federal court on an assertion of fraudulent joinder of a plaintiff has never been authorized by Congress nor sanctioned by this Court. Cf. *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 152 (1914). Where a plaintiff—or a group of plaintiffs—has exercised its right to assert a claim against a defendant, the proper method of challenging that assertion is by seeking a dismissal in state court. Cf. 14B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3723, at 658 (3d ed. 1998) (concluding that the "confusion" surrounding fraudulent misjoinder of parties "easily could be avoided by having the removing party challenge the misjoinder in state court before seeking removal").

issues were briefed extensively by the parties. The district court's refusal to rule on these "difficult" issues created by Ruhrgas can hardly be described as efficient. Had the court simply resolved all doubts in favor of remand (as required by federal law) and returned the case to state court, the result would have been unappealable.⁴¹

Instead, the district judge ignored the subject matter jurisdiction challenge and erroneously dismissed the case for lack of personal jurisdiction. In so doing, the court created an appealable decision, injecting even more inefficiency into the process. Although the original Fifth Circuit panel found there was no subject matter jurisdiction and ordered a remand, Ruhrgas dragged the controversy out even further by petitioning this Court for *certiorari*. Upon denial of that petition, the Fifth Circuit (on its own motion) elected to hear the case again, and ultimately remanded to the district court for a determination of subject matter jurisdiction. Displeased with that result, Ruhrgas continued to prolong the controversy by seeking further review.

In the four years of controversy since this case was removed, this entire state law dispute could have been disposed of in the state system. Instead, the federal courts have yet to establish their jurisdiction over the case, and merits discovery has not even begun. Clearly, Ruhrgas' proposed "efficiency jurisdiction" has proven anything *but* efficient.

Furthermore, as Ruhrgas' tortured subject matter jurisdiction arguments make clear, the recognition of discretionary "efficiency jurisdiction" merely invites

⁴¹ See *United States v. Rice*, 327 U.S. 742, 751 (1946); 28 U.S.C. § 1447(d).

abuse. If Ruhrgas' position is upheld, defendants nationwide will use the result as a basis for removing an action to federal court whenever there is even a possibility of subject matter jurisdiction, and then will press for a personal jurisdiction (or other "jurisdictional") ruling because the subject matter jurisdiction issue is "too hard." Such a result would replace the limited subject matter jurisdiction of the federal courts with a new era of forum shopping, and would thus undermine the allocation of authority between federal and state courts.

CONCLUSION

Questions of federal subject matter jurisdiction are questions of constitutional law, and "efficiency" should play little, if any, role in their resolution.

In 1864, former Justice Benjamin Curtis made the still-timely reminder: "Let it be remembered, also, for just now we may be in danger of forgetting it, that questions of jurisdiction were questions of power as between the United States and the several States." There is a recurring temptation to view questions of federal jurisdiction as if they were simple procedural questions, to be resolved in whatever fashion will best serve the desirable goal of efficient judicial administration. But when it is remembered that the delicate balance of a federal system is at stake, and that expansion of the jurisdiction of the federal courts diminishes the power of the states, it is apparent that efficiency cannot be the sole or the controlling consideration.

CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS, at 2 (5th ed. 1994).

It is self-evident that a federal court first must have jurisdiction *over the case* before it can proceed to rule

on other issues *in the case*. Ruhrgas' request that this Court recognize "efficiency jurisdiction" is an affront to federalism, a model of inefficiency, and an invitation for abuse. This Court should decline to recognize it, confirm the threshold nature of federal subject matter jurisdiction in federal courts, and affirm the Fifth Circuit's decision below.⁴²

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⁴² In a remarkable footnote at the end of its brief (p. 38 n.20), the Petitioner suggests that the judgment below should be reversed and the judgment of the district court affirmed. Respondents submit that the judgment below should be affirmed, but in no event would it be appropriate to order that the judgment of the *district court* be affirmed. The question of personal jurisdiction, which was also before the court of appeals, has not been ruled on, either by the initial panel or by a majority of that court sitting *en banc*, and is not within the question presented to this Court.

(9)

No. 98-470

In The
Supreme Court of the United States

October Term, 1998

RUHRGAS AG,

Petitioner,

v.

MARATHON OIL COMPANY, MARATHON
INTERNATIONAL OIL COMPANY, and
MARATHON PETROLEUM NORGE A/S,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Contrary to the heated rhetoric of the Respondents' Brief, Petitioner is not asking this Court to repeal the Madisonian Compromise. Instead we ask only that district courts have the freedom to decide for themselves which of two jurisdictional issues to consider first.

I. Respondents and the Amicus Ignore the Distinction Between Issues That Go to the Merits and Those That Do Not.

The difference between us is stark. Respondents read this Court's cases as having laid down a rule that "[i]n every federal case, the 'first question' necessarily is that of subject matter jurisdiction." (Resp. Br. 13) That is much too broad a statement. In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 23, ___, 118 S. Ct. 1003, 1014 (1998), this Court reaffirmed "two centuries of jurisprudence affirming the necessity of determining jurisdiction before proceeding to the merits." It distinguished, 118 S. Ct. at 1015 n.3, *Moor v. County of Alameda*, 411 U.S. 693 (1973), in which the Court had declined to decide the validity of pendent-party jurisdiction because it agreed with the district court's discretionary declination of pendent jurisdiction. That case, it said, "decided, not a merits question before a jurisdictional question, but a discretionary jurisdictional question before a nondiscretionary jurisdictional question." In the *Steel Co.* case, Justice Breyer, concurring in part, recognized that federal courts often and typically should decide standing questions at the outset of a case, but he said that he "would not make the ordinary sequence an absolute requirement." 118 S. Ct. at

1021. And Justice Stevens, concurring in the judgment, said: "We have routinely held that when presented with two jurisdictional questions, the Court may choose which one to answer first." 118 S. Ct. at 1022. He pointed to *Sierra Club v. Morton*, 405 U.S. 727 (1972), in which the Court found that petitioner lacked statutory standing and therefore did not decide whether it met the constitutional test for standing.

We submit that a correct understanding of the *Steel Co.* case, and of the law generally on this point, was stated by Judge Stephen F. Williams, writing for his court in *In re Papandreou*, 139 F.2d 247, 255 (D.C. Cir. 1998):

What is beyond the power of courts lacking jurisdiction is adjudication, the act of deciding the case. * * * Thus, although subject-matter jurisdiction is special for many purposes (e.g., the duty of courts to bring it up on their own), a court that dismisses on other non-merits grounds such as forum non conveniens and personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles underlying *Mansfield* and *Steel Company*.

Respondents seize upon the fact that federal subject-matter jurisdiction is a "threshold consideration." (Resp. Br. 10) So it is – but Respondents read far too much into this. In the habeas-corpus area, an argument that a claim is barred by the *Teague* rule is a "threshold matter," but ordinarily it is not to be examined until procedural bars to habeas corpus have been resolved.

It was speculated at oral argument that the Court of Appeals may have resolved the *Teague*

issue without first considering procedural bar because our opinions have stated that the *Teague* retroactivity issue is to be made as a "threshold matter." * * * That simply means, however, that the *Teague* issue should be addressed "before considering the merits of [a] claim" 510 U.S., at 389. It does not mean that the *Teague* inquiry is antecedent to consideration of the general prerequisites for federal habeas corpus which are unrelated to the merits of the particular claim – such as the requirement that the petitioner be "in custody," see 28 U.S.C. § 2254(a), or that the state-court judgment not be based on an independent and adequate state ground.

Lambrix v. Singletary, 520 U.S. 518, ___, 117 S. Ct. 1517, 1523 (1997). In *Lambrix*, while saying that these procedural questions are ordinarily to be considered first, the Court made it clear that it was leaving discretion about this to the lower courts and that judicial economy should be a primary consideration.

We do not mean to suggest that the procedural bar issue must invariably be resolved first; only that it ordinarily should be. Judicial economy might counsel giving the *Teague* question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural bar issue involved complicated issues of state law.

117 S. Ct. at 1523. And Justice O'Connor, dissenting, recognized that there might be exceptions to the rule that the procedural-bar issue should be resolved first. "One case might be where the procedural bar issue is excessively complicated, but the *Teague* issue can be easily resolved." 117 S. Ct. at 1534.

Other recent decisions support the view that a court may choose on which preliminary issue to decide a case so long as it does not go to the merits of the case. In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, ___, 117 S. Ct. 2231, 2244 (1997), objectors to the settlement of a class action argued that there was no case or controversy, that certain of the claimants lacked standing to sue, and that those claimants did not meet the amount-in-controversy requirement. But the Court did not resolve these objections, two of them constitutional and one statutory, to subject-matter jurisdiction. "We agree that '[t]he class certification issues are dispositive,' * * * ; because their resolution here is logically antecedent to the existence of any Article III issues, it is appropriate to reach them first * * * ." And in *Arizonans for Official English v. Arizona*, 520 U.S. 43, ___, 117 S. Ct. 1055, 1068 (1997), the Court had "grave doubts" whether two of the parties had standing to pursue appellate review. Instead it chose to decide whether the originating plaintiff still had a case to pursue. The Court said that it could do this because both the standing and the mootness issues go to whether the courts have Article III jurisdiction, "not to the merits of the case." 117 S. Ct. at 1068.

In *Willy v. Coastal Corp.*, 503 U.S. 131 (1992), the district court awarded Rule 11 sanctions against the plaintiff for conduct unrelated to the plaintiff's challenge to removal jurisdiction. The Fifth Circuit ultimately held that removal jurisdiction was lacking and that a remand to state court was required, but it nevertheless upheld the award of sanctions. This Court affirmed, rejecting the argument that the imposition of sanctions ran afoul of

Article III given the absence of subject-matter jurisdiction. It explained:

Such an order implicates no constitutional concern because it 'does not signify a district court's assessment of the legal merits of the complaint.' It therefore does not raise the issue of a district court adjudicating the merits of a 'case or controversy' over which it lacks jurisdiction.

503 U.S. at 138 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990)). Similarly, the district court's dismissal of this case for lack of personal jurisdiction "does not signify a district court's assessment of the legal merits of the complaint," and it does not "raise the issue of a district court adjudicating the merits of a 'case or controversy' over which it lacks jurisdiction."

Steel Co. confirms that the "separation of powers" issue relied on so heavily by the Respondents and the Amicus is implicated only when a federal district court exceeds its powers. In *Steel Co.*, this Court declined to endorse the doctrine of "hypothetical jurisdiction," i.e., the practice of assuming jurisdiction for the purpose of deciding the merits, "because it carries the courts beyond the bounds of authorized judicial action and thus offends federal principles of separation of powers." 118 S. Ct. at 1012. The Court noted that "for a court to pronounce upon the meaning or constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." 118 S. Ct. at 1016.

Thus, under *Steel Co.*, the critical question in this case is whether a district court has the power to dismiss for

lack of personal jurisdiction without reaching subject-matter jurisdiction first. Because a court always has jurisdiction to determine its own jurisdiction, the indisputable answer to this question is yes. Under *Steel Co.*, the district court's dismissal for lack of personal jurisdiction is not "beyond the bounds of authorized judicial action," it is not "ultra vires," and it therefore does not "offend[] fundamental principles of separation of powers." 118 S. Ct. at 1012, 1016.

In this case the motion to dismiss for want of personal jurisdiction raised a constitutional issue.¹ The motion to remand for want of subject-matter jurisdiction raised issues largely statutory in nature, though perhaps with constitutional overtones.² As all of the cases just cited show, the court has discretion as to which preliminary issue to take up first. The limitation is that the court must be sure it has jurisdiction before it goes to the merits of the case. There is all the more reason to consider some other issue before getting to subject-matter jurisdiction when that other issue is personal jurisdiction, itself a

¹ Respondents make no mention of *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 381-82 (1937). As we have shown (Pet. Br. 13-14), that case, building on cases going back to 1901, holds that personal jurisdiction of a defendant is "an essential element" of a federal court's jurisdiction.

² The claim of fraudulent joinder went to the requirement of complete diversity, which is a statutory rule. The dispute about arbitration went to whether 9 U.S.C. § 205 was applicable. The claim that the questions of foreign relations are part of federal common law goes in the first instance to the meaning of 28 U.S.C. § 1331, although the scope of the constitutional grant of "arising under" jurisdiction would be in the background.

"nondiscretionary jurisdictional question" and an essential element of the court's power to decide the case.

II. The Removal Statutes Do Not Require the Fifth Circuit's Mandatory Rule.

Respondents seize on language about the removal statutes being strictly construed and all doubts resolved in favor of remand. They argue from this that if the question of subject-matter jurisdiction is difficult, the district court should remand for that reason alone, rather than dismissing for want of personal jurisdiction. (Resp. Br. 17-19) But jurisdiction on removal is not some sort of second-class jurisdiction. Mere difficulty in deciding whether the requirements for removal have been met has never been thought in itself to be a ground for remand. "[S]ince the remand to a state court is not a reviewable order, the federal court should be cautious about directing remand too easily lest it erroneously deprive a removing defendant of the statutory right to a federal forum." 14B CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* 3D § 3721, at pp. 351-52 (1998). This Court emphasized that point long ago:

While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.

Wecker v. National Enameling & Stamping Co., 204 U.S. 176, 185-86 (1907). If the rule were as Respondents contend, it would hardly be possible for the Court to uphold removal in a case such as *American National Red Cross v. S.G.*, 505 U.S. 247 (1992). The five Justices in the majority in that case expressly found that the subject-matter jurisdiction question raised by the case was "difficult," 505 U.S. at 250, and, on Respondents' argument, that conclusion should have required remand. The difficulty is emphasized by the fact that four Justices would have held that the case was not removable. Yet the majority resolved the "difficult" subject-matter jurisdiction question by holding that federal jurisdiction existed and that removal of the case was proper. 505 U.S. at 250-65.

In attempting to justify the Fifth Circuit's mandatory rule, Respondents rely on 28 U.S.C. § 1447(c), which provides that a case shall be remanded "[i]f at any time before final judgment it appears that the district court lacks subject-matter jurisdiction * * *," and on 28 U.S.C. § 1447(d), which provides that removal orders are not appealable if based on lack of subject-matter jurisdiction. However, the district court in this case never concluded that it lacked subject-matter jurisdiction; it elected to avoid the questions raised by the subject-matter jurisdiction challenge, some of which were difficult, in favor of an easier disposition of the case for lack of personal jurisdiction. Nothing in the removal statutes obligates a district court to remand a case to state court unless and until the district court determines that subject-matter jurisdiction is lacking.

III. A Defendant Is Not Required to Waive its Removal Rights in Order to Test Personal Jurisdiction.

Respondents and the Amicus assert that it is more efficient for defendants in the position of Ruhrgas to waive their rights to remove the case to federal court and to assert their personal-jurisdiction defense in state court. (Resp. Br. 26, Amicus Br. 12-14) This argument, which again denigrates the defendant's statutory right of removal, ignores the reality of complex commercial litigation. Foreign defendants, such as Ruhrgas, faced with a purposefully crafted state-court lawsuit by a local plaintiff seeking substantial damages, have 30 days to decide whether to seek removal of the case. Often, as in this case, the plaintiff's petition sheds little light on the plaintiff's asserted basis for jurisdiction in the forum state. As in this case, the deposition of the plaintiff's own witnesses may confirm the absence of jurisdiction in the forum state, making the personal-jurisdiction question an easy one for the district court to resolve. But a defendant, believing in good faith that the federal court has subject-matter jurisdiction of the case, cannot wait until the state court has decided the question of personal jurisdiction. A defendant must remove within 30 days or not at all. A decision by the state court that it lacks personal jurisdiction would of course dispose of the case, but if the state court should hold that personal jurisdiction exists, this would not start a new 30-day period running under the second paragraph of 28 U.S.C. § 1446(b). It is for reasons of this kind that a long line of cases has held that a defendant need not follow the course that Respondents and Amicus suggest. By removing a case to federal court,

a defendant does not waive its objection to personal jurisdiction. *Morris & Co. v. Skandinavia Ins. Co.*, 279 U.S. 405, 409 (1929); *Arizona v. Manypenny*, 451 U.S. 232, 242 n.17 (1981). A defendant has "the same right to invoke the decision of the United States court on the validity of the prior service that he has to ask its judgment on the merits." *General Investment Co. v. Lake Shore & M. S. R. Co.*, 260 U.S. 261, 268-69 (1922).

The Amicus says that "[t]he Fifth Circuit restricted its ruling to removed cases * * * ." (Amicus Br. 14) This is not entirely correct. The Fifth Circuit explicitly left open whether its mechanical rule that subject-matter jurisdiction must always be resolved before considering personal jurisdiction would apply to cases commenced in federal court. It said that those cases "may raise other issues that we do not face in the instant case, so any opinion as to those issues would, as a consequence, be premature." 145 F.3d at 225, J.A. 501. The dissenters thought that there is no principled way to confine the ruling to removed cases, 145 F.3d at 230 n.5, J.A. 514, and we have set out in our initial submission our similar doubts.³ (Pet. Br. 26 n.8) The attempt of Amicus to find a principled basis for limiting the rule adopted below to removed cases (Amicus Br. 10-14) reinforces those doubts. Amicus argues that the only harm in passing on subject-matter jurisdiction first is that a defendant may be forced to litigate those issues even when it is not subject to personal jurisdiction. In a removed case, Amicus argues, a

³ Respondents go beyond our expression of doubt. They say flatly that in "every federal case" subject-matter jurisdiction must be passed on before any other issue. (Resp. Br. 13)

defendant can avoid this. A defendant can "simply raise the alleged absence of personal jurisdiction in state court instead of choosing to remove." (Amicus Br. 12) But we have shown in the preceding paragraph why a defendant is not required to yield its statutory right to remove.

IV. Respondents' Predictions of Inefficiency and Abuse of a Discretionary Rule Are Unwarranted.

Respondents assert that "the costs of a 'discretionary,' multi-factor approach clearly exceed the benefits." (Resp. Br. 25) Apparently, Respondents contend that the analysis of federalism and judicial-efficiency considerations under a discretionary rule constitutes an inefficient use of judicial resources. Respondents' argument ignores the fact that the discretionary rule gives the district courts the *option* (but not the obligation) to analyze the federalism and efficiency considerations presented by a particular case⁴ in order to avoid difficult questions of

⁴ In this case, the federalism considerations are minimal. Although Respondents assert that "state courts invariably have a special interest in interpreting and applying their own long-arm statutes," (Resp. Br. 23 n.33) the personal-jurisdiction issue presented to the district court in this case did not involve the interpretation or application of the Texas long-arm statute. Texas has interpreted its long-arm statute to extend to the full extent of due process, and the personal-jurisdiction question therefore simply was a question of federal due process. Although the state courts have the equal obligation to guard, enforce, and protect the rights granted and secured by the United States Constitution, the states have no special interest in interpreting and applying the United States Constitution. Furthermore, this is not a case in which a defendant has contrived on frivolous grounds to have the personal-

subject-matter jurisdiction. This flexibility enables the federal district courts to manage their heavy dockets in the most efficient manner.

Respondents also argue that delays in this case demonstrate the inefficiency of a discretionary rule. This case, however, clearly illustrates the efficiency inherent in the discretionary rule. The district court authorized limited discovery on all jurisdiction issues (both subject-matter and personal), and based on the submissions of the parties, concluded that the personal-jurisdiction issue was resolved easily in Ruhrgas's favor. As a result, the case was dismissed just a few months after it was filed. The seven Fifth Circuit Judges who looked at the personal-jurisdiction question agreed that it "could be resolved relatively easily in Ruhrgas's favor."⁵ 145 F.3d at 233, J.A. 523. But for the Fifth Circuit majority's imposition of a mandatory rule requiring that subject-matter jurisdiction be addressed first in every removed case, this case would have been over long ago.

Respondents also assert that the discretionary rule proposed by Ruhrgas would result in "a new era of forum shopping."⁶ (Resp. Br. 29) This Court rejected a virtually

jurisdiction issue decided by a wholly inappropriate forum. Ruhrgas's notice of removal presented substantial questions of subject-matter jurisdiction. Under these circumstances, federalism concerns are "minimized." *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559, 566-67 (5th Cir. 1993), cert. denied, 510 U.S. 1041 (1994).

⁵ The other nine Fifth Circuit Judges did not address the personal-jurisdiction question.

⁶ That Respondents should even mention "forum shopping" brings to mind President Franklin Roosevelt's

identical argument in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 77-78 (1996), in language which we quoted in our opening brief. (Pet. Br. 28)

The district judge, in the exercise of her discretion on how best to manage her caseload, addressed first the comparatively straight-forward issue of personal jurisdiction. Her holding on that issue eliminated the need to resolve the subject-matter questions presented by the motion to remand, some of which were complex and difficult to resolve. Nothing in the Constitution or the removal statutes bars the discretionary rule applied by the district court in this case. Given the obvious lack of personal jurisdiction over Ruhrgas, the district court's dismissal of this case should be affirmed or, alternatively, the Fifth Circuit's judgment should be reversed and the

remark, when the Republicans were speaking of "the Roosevelt depression," that he had been brought up "never to mention 'rope' in the house of a man who has been hanged." In order to bring this case in a Texas state court and try to keep it there, the Marathon group did not include in the suit the only real party in interest, MPCN. They named Norge as a plaintiff, though Norge assigned all of its rights in the Heimdal Field to MPCN in the 1970s. They sued Ruhrgas alone, though it has only roughly a 25% interest under the HGSA, and omitted the state-owned buyers and the alleged co-conspirator Statoil, Norway's state-owned oil company, who could have removed the case to federal court under the Foreign Sovereign Immunities Act. And they brought suit in Texas though none of the alleged misconduct occurred in Texas and Ruhrgas is not subject to personal jurisdiction in any Texas court.

case remanded to the Fifth Circuit for further proceedings.

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No. 98-470

Supreme Court, U.S.

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October Term, 1998

RUHRGAS AG,

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MARATHON OIL CO.,
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On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF AMICUS CURIAE CONFERENCE OF CHIEF
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INTEREST OF AMICUS CURIAE¹

The Conference of Chief Justices consists of the highest justice or judge in each of the fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands. The purpose of the Conference of Chief Justices is to provide an opportunity for consultation among the highest judicial officers of the several states, commonwealths, and territories, concerning matters of importance in the operation of state courts and judicial systems. In large part, the ultimate goal of the Conference is to improve the administration of justice.

The case of *Ruhrgas v. Marathon Oil Co., et al.*, will resolve an issue that has significant federalism consequences for every state's judicial system. When a plaintiff chooses a state judicial forum to adjudicate claims based on state law, the state has an obvious interest in adjudicating the case. This interest remains despite a defendant's decision to remove the case to federal court, especially when the federal court is without subject matter jurisdiction. Thus, a federal district court that carefully scrutinizes its subject matter jurisdiction in a removed case *before resolving any other issue* directly promotes the policies underlying the doctrine of subject matter jurisdiction by protecting state judicial systems from

¹ Statement required by Supreme Court Rule 37.6 – This brief has been exclusively authored by the Attorney for *Amicus Curiae* indicated on the cover of this brief, who is not an attorney for any of the parties to this litigation; and there was no monetary contribution to the preparation or submission of this brief made by any person or entity other than the *amicus curiae*.

an inappropriate expansion of federal jurisdiction beyond the limits set by Congress in accordance with Article III of the Constitution. On the other hand, a federal district court that avoids a challenge to its subject matter jurisdiction and dismisses a case for lack of personal jurisdiction collaterally estops state court adjudication of an issue that state courts have both the authority and competence to decide, and one that often turns in part on matters of state law. Thus, in the interest of protecting state court autonomy from inappropriate federal judicial encroachment, and in the further interest of fostering comity between this nation's state and federal courts, the Conference of Chief Justices has an interest in seeing this Court affirm the en banc ruling of the Fifth Circuit.

This *amicus curiae* brief is being filed with the written consent of all parties.

SUMMARY OF ARGUMENT

The determination of which of two essential jurisdictional prerequisites should be given priority by a federal district court ought to turn on the respective purposes of those jurisdictional doctrines, and not on considerations of judicial efficiency and economy. Although case-by-case considerations of judicial economy have traditionally played a role in the federal courts' application of certain *discretionary* doctrines, such as abstention and supplemental jurisdiction, the two jurisdictional doctrines at issue in the present case are *essential* to a federal court's authority to adjudicate a dispute; consequently, neither doctrine traditionally has turned on considerations of

judicial economy. Thus, it makes little sense to look to judicial economy in deciding which of the two jurisdictional prerequisites should be addressed first. Instead, this Court should focus on the policies underlying the requirements of personal jurisdiction and subject matter jurisdiction, which should be *mutually* served if at all possible. In a removal case, the only way for a federal court to achieve the goal of mutual promotion of the policies underlying both jurisdictional doctrines is to prioritize challenges to its subject matter jurisdiction. The doctrine of subject matter jurisdiction is designed to foster institutional concerns involving matters of comity and federalism – e.g., preventing federal judicial encroachment on the state courts' general jurisdiction, pursuant to which state courts are presumed to have the competence to decide matters of federal law (like personal jurisdiction). When a federal district court lacking subject matter jurisdiction nevertheless dismisses a case on personal jurisdiction grounds, it offends the very purposes of the subject matter jurisdiction requirement by improperly encroaching on state court authority to decide the personal jurisdiction issue, and by interfering with the state's interest in doing so, particularly when the plaintiff has initially chosen a state forum to adjudicate its claim, as is necessarily true when a case is in front of a federal district court on removal.

On the other hand, even assuming a lack of personal jurisdiction, a federal court that prioritizes challenges to its subject matter jurisdiction does not, at least in removed cases, threaten to undermine the purposes of the personal jurisdiction doctrine. The requirement of personal jurisdiction is an individual constitutional right of

the defendant which is designed to prevent both state and federal courts from upsetting a defendant's settled expectations regarding where it can reasonably anticipate being sued. Since state courts are bound to uphold this right and are presumed competent to decide matters of personal jurisdiction, state courts can and will ensure (as effectively as federal courts) that defendant enjoys this individual right. Therefore, the personal jurisdiction doctrine is in no way compromised by a requirement that federal courts determine their subject matter jurisdiction before moving on to personal jurisdiction. Nor can *Ruhrgas* persuasively argue that a federal court's deprioritization of the personal jurisdiction issue following removal somehow unfairly forces it to appear in federal court and litigate subject matter jurisdiction. Since *defendant* chooses whether or not to attempt removal to federal court, it is clearly defendant's choice whether or not to inject the issue of federal subject matter jurisdiction into the litigation. Assuming there truly is no personal jurisdiction, a defendant sued in state court has a vehicle available not only to resolve the personal jurisdictional issue but to resolve it on a priority basis, before ever spending time and money litigating the matter of federal subject matter jurisdiction - *i.e.*, simply raise the alleged absence of personal jurisdiction in state court instead of choosing to remove.

The preceding analysis provides a principled basis on which to confine the Fifth Circuit's ruling to removed cases. It is only in removed cases that the defendant has made a choice to inject federal subject matter jurisdiction into the case; thus, it is only in removed cases that defendant is *itself* responsible for creating the need to spend

time and money litigating subject matter jurisdiction in a forum in which defendant may not constitutionally be subject to personal jurisdiction. Indeed, the only time the Fifth Circuit's "subject matter jurisdiction first" approach remotely threatens the values underlying the doctrine of personal jurisdiction is in cases where the *plaintiff* has chosen a federal forum and thereby made an issue of subject matter jurisdiction. In cases brought originally by plaintiffs in federal court, the prioritization of subject matter jurisdiction may somewhat undermine defendant's due process rights by forcing it to litigate at least the subject matter jurisdiction issue before the court ever considers defendant's claim that it is not subject to the court's personal jurisdiction. In cases originally filed in *state* court, however, it will be the *defendant* who controls whether or not it will have to litigate federal subject matter jurisdiction prior to having an opportunity for a dismissal grounded on the absence of personal jurisdiction. A defendant who wishes to prioritize a quick dismissal on personal jurisdiction grounds can seek to do so immediately in state court. This analysis is entirely consistent with the notion that the doctrine of personal jurisdiction is an individual right of the defendant. Since personal jurisdiction is an individual right that, unlike subject matter jurisdiction, can be altogether waived by a defendant choosing not to raise it, surely any interest in having it decided on a priority basis (before spending time and money litigating any other issue in an allegedly "unconstitutional" forum) can similarly be forfeited by a defendant's choice to remove the case to federal court. In short, the Fifth Circuit approach is not a *per se* rule for any and all cases in federal court. The Fifth Circuit

restricted its ruling to removed cases and, as just demonstrated, there is a principled basis for doing so.

ARGUMENT

Ruhrgas builds its argument on two "bedrock principles" of jurisdiction that, upon close inspection, say little about how the issue before the Court should be resolved. The first principle is that every district court has jurisdiction to decide its own jurisdiction. See *United States v. United Mine Workers*, 330 U.S. 258, 290-91 (1947). The second is that personal jurisdiction and subject matter jurisdiction are both essential prerequisites to the district court's appropriate exercise of jurisdiction. What Ruhrgas fails to appreciate is that neither of these "bedrock principles" conflicts with the Fifth Circuit's ruling that, in removed cases, a district court should resolve challenges to its subject matter jurisdiction first. The Fifth Circuit ruling neither deprives a district court of jurisdiction to decide its own jurisdiction, nor does it somehow relegate personal jurisdiction to a less than essential prerequisite to a district court's authority to adjudicate the merits of a case. In short, the "bedrock principles" upon which Ruhrgas bases its challenge to the Fifth Circuit holding are in no way threatened by that holding. Nevertheless, Ruhrgas reasons from these principles, in rather conclusory fashion, that a district court therefore has the discretion to pick and choose which of the two jurisdictional issues it should decide first, primarily on the basis of which one is easier to decide.

While Ruhrgas's concern for the efficiency and economy of this nation's federal courts is certainly commendable, it is easy to forget when reading its brief that neither of the jurisdictional doctrines at issue turn on considerations of judicial economy, and that Ruhrgas is the party that chose to inject the tricky subject matter jurisdiction issues into the case by removing it to a federal forum. Although the choice of whether to remove is certainly defendant's to make, one of the consequences of that choice is to leave behind a state court where matters of personal jurisdiction necessarily would be given priority. Both of these aspects of the case – *i.e.*, that judicial economy concerns are irrelevant to mandatory jurisdictional prerequisites, and that Ruhrgas chose the federal forum – strongly support affirming the Fifth Circuit.

First, Ruhrgas's emphasis on judicial economy is misplaced. Since the issue before the Court is whether a federal district court on removal should decide subject matter jurisdiction before reaching personal jurisdiction, the critical policy concerns that should inform the resolution of this issue are surely those policies that underlie the two distinctive requirements of subject matter jurisdiction and personal jurisdiction. And it is worth noting that *neither* the doctrine of subject matter jurisdiction *nor* the doctrine of personal jurisdiction turn on case-by-case considerations of judicial economy. Indeed, as Ruhrgas itself points out (in one of its "bedrock principles"), both aspects of jurisdiction are essential. That is precisely why the analogies it attempts to draw to abstention and supplemental jurisdiction are transparently inapt. Abstention and supplemental jurisdiction are *discretionary* prudential

doctrines that inherently require case-by-case decision-making that may turn, in part, on considerations of economy and efficiency. See, e.g., *City of Chicago v. International College of Surgeons*, 522 U.S. 156, ___, 118 S. Ct. 523, 534 (1997) (listing "judicial economy" as a factor relevant to a federal court's decision whether to exercise supplemental jurisdiction); *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 500-01 (1941) (listing the "smooth working of the federal judiciary" as one of the considerations relevant to a federal court's discretionary exercise of abstention). In stark contrast, as *Ruhrgas* itself emphatically and repeatedly points out, it is *essential* that a federal district court have *both* subject matter jurisdiction and personal jurisdiction in order to adjudicate a claim. Therefore, this Court's precedent construing *non-mandatory discretionary* doctrines like abstention and supplemental jurisdiction is simply irrelevant to the matter currently before the Court.

Instead of focusing on concerns, like judicial economy, that have no place in the determination of either of the two mandatory jurisdictional requirements at issue, and instead of relying on precedent construing wholly different discretionary doctrines, the key to this case rests in an appreciation of *why* both subject matter jurisdiction and personal jurisdiction are mandatory. When one appreciates the completely different reasons why these two completely different types of jurisdiction are mandatory, it becomes clear why a federal district court should resolve its subject matter jurisdiction first when a case is before it following removal.

The doctrine of subject matter jurisdiction protects certain important institutional interests that transcend the

particular interests of the parties. See *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 851 (1986). First, and foremost, enforcing the doctrine of subject matter jurisdiction ensures that the federal courts do not exceed the limits that Congress has placed on their power. Under Article III of the Constitution, there is no inherent federal district court power arising from the Constitution. Rather, with the exception of the United States Supreme Court, federal courts derive their jurisdictional authority from Congress. Thus, rigorous scrutiny of subject matter jurisdiction is a classic example of federal judicial restraint; it represents the federal judiciary's effort to avoid assuming more power than Congress (or the Framers) intended. Additionally, rigorous federal district court scrutiny of its subject matter jurisdiction serves important comity and federalism concerns. As the Fifth Circuit en banc majority recognized, under our federal constitutional scheme, the states are assumed equally capable of deciding state and federal issues (including, of course, the Due Process "minimum contacts" personal jurisdiction issue). Thus, to the extent that Congress has limited the jurisdiction of the lower federal courts, the state courts become the sole vehicle for the initial determination of state and federal issues. According to the leading treatise on federal practice, "it would not simply be wrong but indeed would be an unconstitutional invasion of the powers reserved to the states if federal courts were to entertain cases not within their [subject matter] jurisdiction." 13 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL*

PRACTICE AND PROCEDURE § 3522, AT 61-62 (2D ED. 1984).² Indeed, this Court has emphasized that "[d]ue regard for the rightful independence of state governments" requires that federal courts "scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971).

In contrast to subject matter jurisdiction, the Due Process limit on personal jurisdiction "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Thus, the doctrine of personal jurisdiction prevents both state and federal courts from upsetting a defendant's settled expectations regarding where it can reasonably anticipate being sued. *Insurance Corp. of Ireland*, 456 U.S. at 702-04.

In light of the disparate purposes which underlie personal jurisdiction and subject matter jurisdiction, it becomes apparent that subject matter jurisdiction should take precedence in removed cases – not because it is necessarily "superior" to personal jurisdiction, but because deciding personal jurisdiction in lieu of subject matter jurisdiction can defeat the purposes underlying

² The treatise does not in any way qualify this forceful statement with an "unless the invasion of state power consists only of deciding a personal jurisdiction issue." Such a qualification, of course, would be fundamentally inconsistent with the broad and forceful proposition quoted above.

the subject matter jurisdiction requirement, while deciding subject matter jurisdiction in lieu of personal jurisdiction poses no threat whatsoever, at least in removed cases, to the purposes underlying the personal jurisdiction requirement. If both doctrines are equally essential, as Ruhrgas argues, then the purposes of both should be mutually served whenever possible. In removal cases, mutual service of the disparate purposes of the two jurisdictional prerequisites *can* be achieved – but *only* by taking the issues in the order prescribed by the Fifth Circuit. This is because a dismissal on personal jurisdictional grounds in a removed case where subject matter jurisdiction is absent collaterally estops the relitigation of the personal jurisdiction issue in state court, even though the action was originally filed in state court, even though the personal jurisdiction issue is one that the state courts are competent to decide, even though the absence of federal subject matter jurisdiction to support the defendant's removal normally results in an immediate remand to state court, and even though the personal jurisdiction issue may require an interpretation (as it did in this case) of state law in order to assess the "contacts" between the defendant, the forum, and the causes of action. For a federal district court to permanently avoid resolution of subject matter jurisdiction in such a case obviously undermines the very institutional values that rigorous federal court scrutiny of its subject matter jurisdiction is intended to foster.

On the other hand, a federal district court's dismissal of a removed case on subject matter jurisdiction grounds poses no similar threat to the purposes underlying the doctrine of personal jurisdiction, even when the federal

district court's "subject matter dismissal" leaves the defendant's challenge to personal jurisdiction undecided, as it would under the Fifth Circuit approach. This is because the doctrine of personal jurisdiction is in the form of a personal constitutional right of the defendant. Because the state courts as well as the federal courts are bound to uphold this right, and are competent to resolve disputes centering on the right, state courts can and will ensure that defendant enjoys this individual right. The personal jurisdiction doctrine is, therefore, in no way compromised by a requirement that federal courts determine their subject matter jurisdiction before moving on to personal jurisdiction. Nor can Ruhrgas persuasively argue that a federal court's deprioritization of the personal jurisdiction issue following removal somehow unfairly forces it to appear in federal court and litigate subject matter jurisdiction. Since *defendant* chooses whether or not to attempt removal to federal court, it is clearly defendant's choice whether or not to inject the issue of federal subject matter jurisdiction into the litigation. Assuming there truly is no personal jurisdiction, a defendant sued in state court has a vehicle available not only to resolve the personal jurisdictional issue but to resolve it on a priority basis, before ever spending time and money litigating the matter of federal subject matter jurisdiction – *i.e.*, simply raise the alleged absence of personal jurisdiction in state court instead of choosing to remove. If personal jurisdiction is as obviously lacking and as simple to resolve in this case as Ruhrgas claims throughout its brief, and if federal subject matter jurisdiction poses the difficulty of resolution that Ruhrgas claims, what possible strategy motivated it to remove in the first

place? It certainly could not have been the concern for federal judicial efficiency that it now so openly displays in its brief. Either the personal jurisdiction issue was never as easy and obvious as Ruhrgas claims, or Ruhrgas simply does not trust the state courts to resolve it fairly and correctly. If the former, that certainly bears on the genuineness of its arguments; if the latter, such a view not only insults the states but is inconsistent with several of the fundamental notions underlying the usual requirement that federal courts carefully scrutinize their subject matter jurisdiction in every case – that state courts have general jurisdiction, that state courts are competent to resolve matters of federal constitutional law (like personal jurisdiction), and that state sovereignty is therefore directly impacted by federal courts that act outside their subject matter jurisdiction.

Additionally, the preceding analysis provides a principled basis on which to confine the Fifth Circuit's ruling to removed cases. It is only in removed cases that the defendant has made a choice to inject federal subject matter jurisdiction into the case; thus, it is only in removed cases that defendant is *itself* responsible for creating the need to spend time and money litigating subject matter jurisdiction in a forum in which defendant may not constitutionally be subject to personal jurisdiction. Indeed, the only time the Fifth Circuit's "subject matter jurisdiction first" approach remotely threatens the values underlying the doctrine of personal jurisdiction is in cases where the *plaintiff* has chosen a federal forum and thereby made an issue of subject matter jurisdiction. In cases brought originally by plaintiffs in federal court,

the prioritization of subject matter jurisdiction may somewhat undermine defendant's due process rights by forcing it to litigate at least the subject matter jurisdiction issue before the court ever considers defendant's claim that it is not subject to the court's personal jurisdiction. In cases originally filed in *state* court, however, it will be the *defendant* who controls whether or not it will have to litigate federal subject matter jurisdiction before having the opportunity for a dismissal grounded on the absence of personal jurisdiction. A defendant who wishes to prioritize a quick dismissal on personal jurisdiction grounds can seek to do so immediately in state court instead of choosing to remove. This analysis is entirely consistent with the notion that the doctrine of personal jurisdiction is an individual right of the defendant. Since personal jurisdiction is an individual right that, unlike subject matter jurisdiction, can be altogether waived by a defendant choosing not to raise it, surely any interest in having it decided on a priority basis can similarly be forfeited by a defendant's choice to remove the case to federal court. In short, the Fifth Circuit approach is not a *per se* rule for any and all cases in federal court. The Fifth Circuit restricted its ruling to removed cases and, as just demonstrated, there is a principled basis for doing so.³

³ Indeed, under the analysis proposed in this *amicus curiae* brief, the Fifth Circuit approach need not even be a *per se* rule for all cases removed from state to federal court. For example, there will be some cases filed in state courts raising exclusively (or primarily) claims based on federal law. In such cases, the personal jurisdiction inquiry may not involve state law matters to the degree that they are implicated by the personal jurisdiction inquiry in the present case. That is not to say that such a case poses insignificant comity concerns. Since state

In sum, the issue before the Court is less about judicial economy than it is about judicial restraint. Neither of the two jurisdictional doctrines at issue turns on judicial efficiency and economy.⁴ Rather, as *Ruhrgas* itself

courts are competent to decide even exclusively federal issues, and have an interest in doing so when a plaintiff chooses to avail itself of a state forum, the comity and federalism concerns are still substantial, though perhaps less so than in a case like the present one where the claims filed in state court are based exclusively on state law.

Additionally, it is important to note that *per se* rules are not necessarily a bad idea when they operate in the context of *procedure*, where consistency and predictability are appreciated by both courts and litigants.

⁴ Even if judicial economy concerns somehow affect the outcome in this case, *Ruhrgas* focuses only on the economy concerns of this particular case without considering how the Fifth Circuit's rule can promote economy concerns over the run of cases by preventing forum-shopping. Shopping for the best forum to litigate the personal jurisdiction question will occur, as it probably did in this case, due to differences in state and federal law regarding who has the burden of proof on the minimum contacts issue. In many states, like Texas, it is the *defendant* who bears the burden of proving no minimum contacts, whereas in federal court it is the *plaintiff's* burden to establish the minimum contacts. And this is just one example of a state court approach to the minimum contacts issue that differs from the federal approach, but that has never been foreclosed by this Court.

Finally, subject matter jurisdiction is rarely going to be more burdensome to decide than personal jurisdiction. Since personal jurisdiction is highly fact-intensive, it will often be necessary (as it was in this case) to engage in costly and lengthy discovery before the issue can be decided. And even if this is the rare case where the personal jurisdiction question is "easier," just how much judicial time is saved when the parties have already fully briefed and argued the subject matter jurisdiction question? If

acknowledges, both doctrines are essential prerequisites to a federal district court's power to adjudicate. And one of those doctrines – subject matter jurisdiction – is specifically founded in no small part on notions of federalism requiring scrupulous federal court scrutiny of its subject matter jurisdiction so as not to intrude on the state courts' general jurisdiction bailiwick. The state courts' general jurisdiction, of course, both provides their authority and assumes their competence to decide federal questions such as the constitutionality of exercising personal jurisdiction over the defendant (which, as in this case, often involves considerations of state law). The only way for a federal court to consistently promote those institutional interests and federalism concerns that are the very point of the subject matter jurisdiction requirement is by deciding challenges to its subject matter jurisdiction *before* addressing challenges to its personal jurisdiction. Finally, if this approach is confined to removed cases, it will in no way undermine the purposes of the personal jurisdiction doctrine.

CONCLUSION

Because federal courts should, when possible, administer themselves in a way that mutually serves the policies underlying both the doctrine of subject matter jurisdiction and the doctrine of personal jurisdiction, the

all that remains is to think, decide, and draft an order explaining the decision, can a federal court truly justify the negative impact on comity and federalism that results from deprioritizing challenges to its subject matter jurisdiction?

Amicus Curiae Conference of Chief Justices respectfully urges this Court to affirm the Fifth Circuit's ruling that a federal district court, in a removed case, should resolve a challenge to its subject matter jurisdiction before addressing a challenge to its personal jurisdiction.

Respectfully submitted by:

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